Nos. 15-1400 (L), 15-1490, and 15-1546
Consolidated with Nos. 15-1514, 15-1586, 15-1639

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In re Capital One Telephone Consumer Protection Act Litigation,

APPEAL OF: Jeffrey Collins, *et al.*, Objectors-Appellants

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:12-cv-10064,
Judge James F. Holderman

# Opening Brief and Required Short Appendix of Appellants Jeffrey Collins, Antonia Carrasco, Vanessa FV VanWieren, and Mary Smith Tweed

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**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 15-1546

Short Caption: IN RE: CAPITAL ONE TELEPHONE PROTECTION ACT LITIGATION

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Jeffrey T. Collins

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Center for Class Action Fairness

Williams Montgomery & John (district court local counsel)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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Attorney's Signature: s/Theodore H. Frank Date: 03/19/2015

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**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

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Short Caption: IN RE: Capital One Telephone

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Antonia Carrasco - Appellant

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Peter F. Higgins, Lipkin & Higgins

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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Attorney's Signature: s/ Christopher A. Bandas Date: 3/11/2015

Attorney's Printed Name: Christopher A. Bandas

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**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 15-1490

Short Caption: In re Capital One Telephone Protection Act Litigation

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Vanessa FV VanWieren and Mary Smith Tweed

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Law Offices of Darrell Palmer PC

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: s/ Joseph Darrell Palmer Date: March 17, 2015

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## Table of Authorities

Cases

Rules and Statutes

Other Authorities

## Statutes and Rules

### 42 U.S.C. § 1988 - Proceedings in vindication of civil rights

…

**(b) Attorney's fees**

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

…

### 47 U.S.C. § 227 - Restrictions on use of telephone equipment

…

**(b) Restrictions on use of automated telephone equipment**

…

**(3) Private right of action**

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

…

**Federal Rule of Civil Procedure 23. Class Actions.**

…

**(e) Settlement, Voluntary Dismissal, or Compromise.**

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise: …

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal. …

**(h) Attorney's Fees and Nontaxable Costs.**

In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

…

**Jurisdictional Statement**

The district court had jurisdiction under, *inter alia*, 28 U.S.C. § 1331, because plaintiffs filed suit alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*. *Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740 (2012). Dkt. 120.[1]

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court judge issued a Memorandum Opinion and Order on February 12, 2015, and a separate Rule 58 final judgment on February 23, 2015. A1; A50. Jeffrey Collins is a class member who formally objected to the fee request before the lower court, filed a valid settlement claim, appeared at the fairness hearing through counsel, and filed a notice of appeal on March 13, 2015. A440-70; A891; A973. Antonia Carrasco, Vanessa FV VanWieren, and Mary Smith Tweed are class members who formally objected to the fee request, and on information and belief filed settlement claims; Carrasco filed a notice of appeal on February 27, 2015, and VanWieren and Tweed did so jointly on March 6, 2015. A408-25; A471-87; A540-48; A968-72. These three notices of appeal are timely under Fed. R. App. Proc. 4(a)(1)(A).

Appellants, as class-members who objected to settlement approval below and filed *pro rata* claims on a common fund, have standing to appeal a court's Rule 23(h) award from the common fund without the need to intervene formally. *Devlin v.*

[1] "Axyz" refers to page xyz of Collins's Appendix. "App. Dkt." refers to docket entries in Appeal No. 15-1400. Except where otherwise noted, "Dkt." refers to docket entries in Case No. 1:12-cv-10064 (N.D. Ill.) below. Record cites were not available as of May 3, 2015.

*Scardelletti*, 536 U.S. 1 (2003); *Silverman v. Motorola Solutions*, 739 F.3d 956, 957 (7th Cir. 2013).

**Statement of the Issues**

1. The Seventh Circuit requires a "market-mimicking approach": "courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time" when setting *ex post* attorneys' fees in a common-fund class-action settlement. *E.g., In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718-19 (7th Cir. 2001) ("*Synthroid I*"). Did the district court err as a matter of law when it held that such market mimicking does not permit the use of an expert witness's methodology consistent with *Synthroid I* because the "market among plaintiffs class action lawyers … may not be highly competitive" and because this was the first case where an expert used empirical data to estimate *ex ante* risk and mimic an efficient competitive market for legal services?

2. Rule 23(h) requires notice of motions for fees to be "directed to class members in a reasonable manner." Does Rule 23(h) require the district court to make public findings dividing fees among multiple law firms submitting a single fee petition, as implied by *In re High Sulfur Content Gasoline Prod. Liab. Litig.*, or may the law firms divide a single lump-sum award amongst themselves pursuant to a secret agreement undisclosed to the class or the court? 517 F.3d 220 (5th Cir. 2008).

3. *Perdue v. Kenny A.*, 559 U.S. 542 (2010), holds that a multiplier of lodestar is appropriate in federal fee-shifting cases only in "exceptional circumstances." *Contra Florin v. Nationsbank, N.A.*, 34 F.3d 560, 564 (7th Cir. 1994) ("*Florin I*"). Is a lodestar

multiplier of 7.1 (a rate of $3,671/hour) permissible in a common-fund settlement where there were no exceptional circumstances?

## Statement of the Case

### A. Plaintiffs file three nationwide TCPA class actions against Capital One that are consolidated in an MDL.

Plaintiffs brought four putative TCPA class actions—three nationwide classes and a class of "Illinois telephone numbers"—against Capital One Financial Corp. and affiliated entities (collectively "Capital One").

| Date | Case | Attorneys |
|---|---|---|
| January 23, 2012 | *Amadeck v. Capital One Financial Corp.*, No. 2:12-cv-00244 (W.D. Wash.) | Williamson & Williams; Terrell Marshall Daudt & Willie, PLLC |
| February 14, 2012 | *Patterson v. Capital Management Services, L.P.*, No. 1:12-cv-01061 (N.D. Ill.) | Keogh Law, Ltd. |
| August 7, 2012 | *Alarcon v. Capital One Bank (USA) N.A.*, No. 3:12-cv-4145 (N.D. Cal.) | Lieff, Cabraser, Heimann & Bernstein, LLP; Meyer Wilson Co., LPA |
| August 25, 2011 | *Martin v. Leading Edge Recovery Solutions, LLC*, No. 1:11-cv-05886 (N.D. Ill.) (class of "Illinois telephone numbers") | Burke Law Offices, LLC |

Alarcon quickly dismissed her case without prejudice on October 1, 2012, in an apparent attempt to join the *Amadeck* case in an amended complaint, an effort mooted by the MDL consolidation. *Alarcon* Dkt. 7; *Amadeck* Dkts. 45, 47.

Before any substantive motions were decided and before any depositions were taken, Capital One moved to stay the cases pending MDL consolidation. *Patterson* Dkt. 64; *Amadeck* Dkt. 30; *Martin* Dkt. 110. On December 10, 2012, the Judicial Panel on Multidistrict Litigation ordered pre-trial consolidation of cases alleging TCPA violations by Capital One, creating MDL No. 2416, *In re Capital One Telephone Consumer Protection Act Litigation* ("*Capital One*"), No. 1:12-cv-10064, before Judge Holderman in the Northern District of Illinois. Dkt. 1 at 2. The order transferred dozens of individual cases to the MDL, as well as the three extant putative class actions. Dkt. 1 at 4-5. The individual cases are not relevant to this appeal.

**B. Despite competing class actions, there is an uncontested motion for counsel appointment.**

The district court ordered a schedule for appointing lead and liaison counsel. Dkt. 7. Although Lieff Cabraser neither had a case nor a client transferred to the MDL, Lieff Cabraser and Terrell Marshall moved the court for appointment pursuant to Rule 23(g)(3) as interim co-lead counsel, with Keogh Law as liaison counsel. Dkt. 11. The two firms argued that they had extensive experience prosecuting TCPA class actions together, obtaining "the largest monetary settlement in the history of the TCPA" and that Keogh Law "ha[d] been litigating TCPA class actions since March 2002." *Id.* at 3, 14. No other law firms sought appointment or objected to appointment. The court granted the motion on February 15, 2013. A189.

Plaintiffs filed a consolidated master class action complaint on February 28, 2013. Dkt. 19. Three weeks later, the parties jointly moved to stay proceedings pending class mediation; the court signed the agreed order. Dkts. 28, 32, 39.

**C. Capital One settles the class action.**

The stay never lifted. On February 11, 2014, the parties informed the court that they had reached a settlement, and class counsel moved for preliminary approval of the settlement on June 13, 2014. Dkt. 121. The proposed settlement covered a settlement class of:

> [A]ll persons within the United States who received a non-emergency telephone call from Capital One's dialer(s) to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from January 18, 2008, through June 30, 2014; and all persons within the United States who received a non-emergency telephone call from a Participating Vendor's dialer(s) made on behalf of Capital One to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from February 28, 2009, through June 30, 2014.

A65-66. Defendants would contribute $75,455,099 to a settlement fund. A66. Each class member could make only one claim for a cash award regardless of the number of telephone calls a class member received. A76. Every class member's claim would be a *pro rata* share of the remaining settlement fund after deducting attorneys' fees, representative incentive payments, and administration expenses. A73.

In addition to the appointed interim counsel (Lieff Cabraser, Terrell Marshall, and Keogh Law), the settlement provided compensation to three other law firms: Burke Law, Meyer Wilson, and Williamson & Williams. A62, A69. The settlement allowed the six law firms (defined as "Class Counsel" under the settlement) to request up to 30% of the $75,455,099 ($22,636,530). *Id*. The settlement did not indicate, however, how the

attorneys' fees would be allocated among the six law firms or who would decide such allocation. *Id.*; A73. Defendants agreed not to oppose any attorneys' fee request or class representative incentive awards of $5,000 each. A69. The Claims Administrator would distribute the settlement funds, first paying "Class Counsel" any awarded attorneys' fees. A73.

The district court granted preliminary approval and appointed Lieff Cabraser and Terrell Marshall as class counsel; Keogh Law as liaison counsel; and Williamson & Williams, Meyer Wilson, and Burke Law as "Additional Class Counsel" (collectively "class counsel"). A194. About 16 million of the approximately 17.5 million class members received direct notice of the settlement. A6.

**D. Collins seeks discovery regarding class counsel's fee request.**

Objector Jeffrey T. Collins is a class member who received prerecorded messages on his cell phone from Capital One regarding a past-due account; Collins received individualized notice of the settlement and filed a claim. A465. Collins was represented below by the non-profit Center for Class Action Fairness. *Id*.

On September 29, 2014, class counsel filed a motion for attorneys' fees requesting 30% of the $75.4 million settlement fund. A201; A215. Class counsel's fee request provided no information regarding their lodestar (A228-29), but argued the fee request was market-rate and justified by the "real" risk they undertook. A219; A223; A226. They did not suggest or propose how the $22.6 million award would be split amongst the six firms, or argue that any one firm was more qualified to bring TCPA litigation than another or entitled to a disproportionate share of the proceeds.

On October 17, 2014, prior to the objection deadline, Collins moved the district court to lift the stay of discovery for limited discovery regarding: (1) class counsel's

lodestar in *Capital One*; and (2) class counsel's lodestar in previous successful and unsuccessful TCPA cases. A388.

In requesting the discovery, Collins argued that it would assist in determining whether class counsel's fee request really did reflect market rates given the risk they undertook and the opportunity costs of the engagement. A390-98. Collins suggested that the fee request likely overcompensated class counsel for the risk actually assumed—particularly because when seeking appointment, class counsel claimed they had such significant success in previous TCPA cases. Only discovery of lodestar information from class counsel's previous TCPA actions would reflect the actual risk class counsel assumed. A396-97. A district court's *ex post* reconstruction of the *ex ante* market in which class counsel's fee would have been negotiated must contemplate the level of risk assumed by class counsel: Collins explained that the actual risk class counsel assumed could be quantified by comparing their lodestar investment in cases they had lost with their lodestar in cases they had won. A397. To that end, Collins' discovery requests sought a snapshot of class counsel's previous TCPA portfolio, narrowly tailored to the previous four years. A397-98.

Class counsel opposed Collins request, arguing that Collins was seeking "a snapshot of the guts of [their] firm," which, if produced, would place class counsel at a "competitive disadvantage." A527. Class counsel also argued that the discovery requests were "quite burdensome" because the requests sought "discovery in every TCPA case, every plaintiff's firm since 2010 of October." A526. They did not propose an alternative timeframe of production.

On October 30, 2014, the district court granted Collins' motion for discovery to be produced by November 13, 2014, and referred the case to Magistrate Young B. Kim to supervise production and decide obligations regarding confidentiality. A539.

After the initial discovery production, Collins moved to compel discovery responses and for additional discovery. A611. Collins sought to remedy class counsel's deficient production that lacked lodestar summaries for several of class counsel's successful cases and information on how fee awards in class counsel's previous cases were allocated among the winning law firms. A618-21. Collins also sought additional discovery requesting class counsel's lodestar information in another TCPA case pending before Judge Holderman, *Wilkins v. HSBC Bank Nevada, N.A.*, No. 1:14-cv-190 (N.D. Ill.) ("*HSBC*"), as well as any agreement regarding allocation of the fee award in *Capital One* among class counsel's six law firms. A622.

On November 21, 2014, Collins' motion was granted in part and denied in part: Magistrate Kim held that class counsel was to provide the missing lodestar information and how the fee awards were allocated in class counsel's previous cases. A625. Magistrate Kim denied the requests for any *Capital One* fee allocation agreement and the *HSBC* lodestar information, finding those requests to fall outside the scope of Holderman's discovery order. A366-67. Collins eventually relied on the public *HSBC* lodestar filings.

**E. Collins objects to the settlement.**

While Collins was awaiting discovery, Collins met the deadline for submitting an objection to the settlement on October 27, 2014, superseding an earlier *pro se* objection he made. A440; Dkt. 143. Collins did not object to settlement approval, but noted that it was a "nuisance settlement" because while the lawsuit alleged that over 16 million class

members were entitled to $500 to $1500 damages per violation, the proposed settlement would distribute an average of less than $3-$4 per class member. A446. The objection argued that class counsel's request for 30% of the $75.4 million was excessive. Among other reasons, the request was excessive given the size of the fund, and the Seventh Circuit's suggestion that larger funds should award a declining percentage at the margin. A452. Furthermore, Collins predicted that the discovery he was seeking would show that because class counsel had a successful portfolio of TCPA cases, and those TCPA cases showed low opportunity costs, class counsel did not need a large multiplier of their lodestar to compensate class counsel for the *ex ante* risk incurred in bringing TCPA cases. A453-55. Finally, Collins objected that the fee request also violated Rule 23(h) because class counsel did not identify how the attorney fee award would be allocated among the different firms serving as class counsel. A457-58.

Carrasco, VanWieren, and Tweed also objected to the fee request as excessive, and joined all other objections; we will refer to the objectors collectively as Collins. A409-10; A485-86; A545-46.

### F. Discovery reveals that TCPA litigation has low risk and opportunity cost; Collins submits an expert report and supplemental briefing.

The lodestar in *Capital One* for the six law firms totaled $2,213,768, based on 4,268 hours for all timekeepers—partners associates, and support staff—averaging $519/hour. A551-54. Timekeepers' tasks were not delineated, and may have included collateral litigation over the fee request discovery, including disputes over the scope of the protective order. Dkts. 205, 206, 229, 237, 241. It certainly included "confirmatory discovery" done after preliminary approval of the settlement. A215; A228; Dkt. 102. But even assuming *arguendo* that none of this time entailed churning and was recoverable

time on behalf of the class, class counsel's $22.6 million fee request sought an effective multiplier of 10.2 and over $5,300 an hour.

Collins' expert, Professor M. Todd Henderson, is a law professor at University of Chicago Law School with economic expertise. A652-54; A690-95. Henderson reviewed the discovery produced by class counsel, which included lodestar and fee award information for 37 cases, and the public lodestar submissions in the parallel *HSBC* case.[2] A711-A822; A707-08; A699. While class counsel collected fees in only 43% of the cases,[3] they incurred an average lodestar of $613,333 in successful cases (at an average blended rate of $487/hour) and $255,402 in unsuccessful cases (at an average blended rate of $473/hour). A680; A704-06. In total, class counsel had devoted $9,813,329 lodestar to successful cases (including *Capital One* and *HSBC*) and $5,618,837 to unsuccessful cases. A705-08; A643-44; A681. This meant that 64% of class counsel's lodestar investment was in cases where they recouped fees, even though only 43% of the cases brought were successful. A702; A646-47; A665.

Henderson's analysis followed Seventh Circuit guidance to reconstruct what a competitive *ex ante* market for legal services would look like. In such a marketplace, Henderson opined, prospective class counsel would look at the expected opportunity

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[2] The *HSBC* attorneys requested $12 million in fees and the district court eventually awarded $9,495,000 for 1845.2 hours of work, or $5149/hour. 2015 U.S. Dist. LEXIS 23869 (N.D. Ill. Feb. 27, 2015); A644.

[3] "43%" is an editing error in the Henderson report text and Collins briefing that neither of the parties nor the district court caught until this brief; the underlying number in the spreadsheet and Henderson's calculations was 16/38 or 42.1%. A703; A646; A37. The difference is immaterial to the Henderson and the district-court analysis, and we will use the same 43% figure the district court used.

cost, the expected chance that investment in the case would produce no return, and the expected size of a settlement in the litigation. They would then propose a contingency-fee percentage that *ex ante* compensated them for that expected risk and opportunity cost. In a competitive marketplace, a firm proposing to a sophisticated client a rate that would result in an above-market return would find itself underbid by competitors willing to accept a smaller above-market return, until all above-market rents were bid away. The resulting rate would produce an expected return of lodestar across a portfolio of cases. For example, if counsel could expect to recover in 50% of the hours they invested, they would seek *ex ante* a percentage of the fund that would produce double lodestar for average recovery and average litigation time invested. A664-77.

Henderson noted that, because class counsel recovered on 64% of their hours (in part by devoting more time to winning cases than losing cases), a lodestar multiplier of 1.57 (the reciprocal of the more precise 63.6% figure) for average results with average opportunity cost would be sufficient to compensate class counsel in *all* TCPA litigation. A643-44; A646-47; A664-66.

The multiplier they had actually received was much greater. In the discovery time frame, class counsel had recovered $17,709,294 for their previous successful cases—a multiplier of 2.57 in those cases—which meant that they had consistently been overcompensated for their risk in those other TCPA cases. A646-47; A707. Henderson calculated that if the $22.6 million *Capital One* request and the $12 million *HSBC* request were added to the $17.7 million already recovered, class counsel would recover over $50 million from a $15.4 million lodestar investment in both successful and unsuccessful cases, which would provide a 324% recovery of their investment—an average return of over $1500/hour, win or lose. A644; A647; A707-08.

Henderson concluded that if one made the simplifying assumption that class counsel had expected *ex ante* a $75.5 million settlement value for a 17.5-million-member class and a $2.2 million lodestar to reach such settlement—*i.e.*, that this settlement reflected average recovery and was litigated with average efficiency—then class counsel in a competitive marketplace would have been willing to bring this case in return for a contingency fee of 4.61% of gross recovery. A649-51; A676-83. The 4.61% recovery would result in fees of $3.48 million, or a 1.57 multiplier of class counsel's claimed $2.2 million lodestar. *Id*. Henderson and Collins argued that these were generous assumptions: most TCPA cases settle for more than $4/class member; and the time incurred in this case reflected six different firms and was several times that of the average TCPA case (or even the average successful TCPA case), lacked substantive litigation, and possibly reflected time billed to multiplying the disputes over fee discovery. A649-51; A684; A628; A633. If one penalized class counsel for below-average results or below-average efficiency, then even the 4.61% figure would be excessive. A651; A633.

Collins submitted a supplemental brief along with Professor Henderson's expert report to the district court on December 5, 2014, ten days after class counsel produced discovery the Tuesday before Thanksgiving. A626-A822; *cf.* A625. In addition to discussing Professor Henderson's findings, Collins responded to plaintiffs' submission of declarations by Professor Brian T. Fitzpatrick (A555) and Professor David Rosenberg (A580). A634-36. Collins argued, *inter alia*, that Fitzpatrick's declaration claiming that a 30% fee recovery was similar to other fee awards was flawed because the other courts had not performed the Seventh Circuit's required *ex ante* market-based test. A634. Collins further noted that neither Fitzpatrick nor Rosenberg's declarations considered

the empirical data of the return class counsel receive for their lodestar investment in TCPA cases, as discussed in Professor Henderson's report, and thus failed to reconstruct a competitive market or explain the above-market returns realized by TCPA counsel. A629.

Class counsel submitted a brief and supplemental expert reports in response. A823. While class counsel had previously challenged Collins' discovery requests as overly burdensome for seeking information back to October 2010 (A526), their response now challenged Henderson's findings arguing that the discovery did not go back far enough. A829-30. Specifically, class counsel argued that in the successful cases reviewed by Henderson, the attorneys' fees were awarded after the *Martin* case was filed in August 2011. A829. Class counsel did not provide any alternative data showing that Henderson's conclusions would have changed if the discovery had instead captured a snapshot of cases before *Martin's* inception or any evidence that TCPA litigation was riskier *ex ante* in 2011 than in the 2010-2014 snapshot Henderson used.

In addition, class counsel argued, *inter alia*, that the majority of TCPA class action settlements approved in the Seventh Circuit in the past four years awarded attorneys' fees of 33% and that the retainer agreements with individual plaintiffs allowed fees up to 40%. A835.

**G. Discovery of previous fee allocation agreements shows surprising divisions.**

Discovery revealed that previously undisclosed side agreements on fee allocation would often divide recovery on grounds other than contribution to the litigation. For

example, in "Case B,"[4] Lieff Cabraser and Meyer Wilson had lodestar of $1.5 and $0.3 million respectively. A707. Notwithstanding this ostensible 5:1 ratio of opportunity cost, their side agreement provided they would receive $1.9 million each from the Rule 23(h) award. *Id*.; A737; A755. In "Case C," Lieff Cabraser and Meyer Wilson each received one-third of a $2.1 million fee award, which was a 1.6 multiplier of Lieff Cabraser's lodestar, but a 6.8 multiplier for Meyer Wilson's lodestar. A707; A737; A755. And in "Case Q," Keogh Law invested $258,103 lodestar and recovered $1.22 million, a multiple of nearly 5, while Burke Law received half that much with $194,500 lodestar, a multiple of just over 3. A707; A791; A804.

Collins' thus renewed his objection that class counsel's failure to disclose how the fee award would be allocated among the six law firms could permit class counsel to hide potentially enormous windfalls at the expense of the class and that it violated Rule 23(h) for the court to delegate the division to plaintiffs' counsel. A638-39.

**H. The fairness hearing and fee award.**

Counsel represented Collins at the fairness hearing on January 15, 2015. A891. Class counsel confirmed that there were 1.9 billion phone calls made to the 17.5 million class members ($950 billion potential damages);[5] the $75.5 million settlement provided $2.72 per class member recovery if 30% fees were awarded. A900; A914. The court

[4] By order of the magistrate, the 37 case names of the interrogatory responses were redacted and identified as Cases A through JJ, with two "Case EE"s, and the redacted data would be public. Dkts. 281, 286. Case A is *Capital One*.

[5] This number of calls—over 100 per class member—seems implausibly high, but even if each class member received only a single phone call in willful violation of the TCPA, potential damages were over $26 billion.

questioned the total recovery because it represented less than 1% of the $500 statutory damages for a single, non-willful TCPA claim; counsel for the settling parties justified the 1% recovery by the risk involved in class certification and litigation. A901. No objector provided any evidence or argument to the contrary relating to Rule 23(e) adequacy.

Counsel for Collins discussed class counsel's failure to explain the largest flaw in their fee request: if class counsel's 30% request represented the *ex ante* market-based rate, then why did it result in such an enormous 10.2-multiplier windfall? A935. The court questioned Collins regarding class counsel's contention that Henderson improperly relied on data subsequent to the filing of the first class action complaint. A935-36. Collins responded that a specific cut-off date for the data was irrelevant because Henderson was reviewing a "snapshot" of class counsel's portfolio. A937; A942. Collins further argued that because class counsel has not argued or provided any evidence how the choice of snapshot affected Henderson's conclusions, the court should draw a negative inference that any change over time was *de minimis*. A937.

Collins argued that while the court was to apply an *ex ante* market-based analysis, the six law firms engaged in anti-competitive behavior eliminating a "market." If there had been an auction when class counsel was first appointed, then the six law firms would have competed against each other and driven a 30% bid to a lower rate, with one firm collecting around 5%. A937-38. Instead, rather than competing against each other at the appointment of lead counsel, the law firms did not challenge the appointment, and the proposed settlement provided *all* six firms with 30% recovery—5% each on average. *Id*.

The district court approved the settlement and awarded $15,668,265 in attorneys' fees. A1, A43. The district court held that class counsel's $22.6 million request amounted to 32% of the $70.3 million available after administrative expenses and named plaintiff service awards. A22. The district court held that the 32% request was excessive. *Id*. The district court concluded that based on empirical studies of other class action settlements of similar sizes, "it is fair to conclude that class members would have negotiated an across-the-board fee somewhere between 20% and 24% of the settlement fund." A25. The court also performed its own empirical analysis of 72 TCPA class action settlements and found that the TCPA fee awards track the same percentages as other cases in the empirical studies and that the percentages declined as the size of the TCPA settlements increased. A28; A44-49. The district court also reviewed fourteen class action cases where the courts had used a competitive process to negotiate class counsel's fee structure. A29. The district court concluded that a competitive process generates a lower percentage-of-the-fund fee arrangement, particularly in settlements that produced large recoveries. *Id*.

In estimating risk, the court chose to use Professor Henderson's 43% *ex ante* number "unadjusted for Class Counsel's investment savvy" rather than his weighted 64% *ex ante* number on the grounds that the Capital One litigation was "slightly" riskier than the typical TCPA litigation. A37 & n.14.

The district court, following a suggestion in the alternative by Collins (A451-52), applied marginal diminishing rates similar to those used in *In re Synthroid Marketing Litig*., 325 F.3d 974, 979-80 (7th Cir. 2003) ("*Synthroid II*"): 30% to the first $10 million, 25% to the second $10 million, 20% to the next $15 million and 15% to the remainder up to $75,455,099, for total fees of $15,068,265. A35. The court then adjusted the tier

structure to 36% for the first $10 million to account for the *increased* risk assumed by class counsel, which resulted in a fee award of $15,668,265. A38-A39.

The district court acknowledged that Professor Henderson's conclusion of a 4.6% negotiated rate would possibly be a good predictor "in a competitive market of homogenous plaintiffs lawyers." A40. The district court held, however, that while it was the district court's job to approximate the market, the market for large TCPA cases was not "highly competitive," noting the frequent agreement of law firms to act as joint class counsel and citing an article criticizing systematic price-fixing by class-action attorneys as evidence of lack of competition. A41. The court also found that Henderson's methodology was limited by the data produced and thus did not demonstrate class counsel would have known "that they needed only to achieve a 1.57 lodestar multiplier to compensate themselves for the contingent risk" in "formulat[ing] their hypothetical *ex ante* bid." *Id*. Moreover, it felt constrained not to use the Henderson methodology because "his model is not among the methods accepted by the Seventh Circuit." *Id.*

The court's opinion did not address Collins's objection to the violation of Rule 23(h) or seek to allocate the lump sum award among the six firms.

Collins, VanWieren, Tweed, and Carrasco filed timely notices of appeal from the court's order. A968-75. This Court consolidated these appeals and three others. App. Dkt. 20.

Collins plans to file a request for attorneys' fees in the district court on or before May 14, 2015.

**Summary of the Argument**

Collins appeals a fee award of $15,068,265 in a case where class counsel from six firms devoted 4,268 hours for all timekeepers—partners, associates, and support staff—over $3671/hour.

This award is not because the underlying TCPA action was extraordinarily risky: the evidence showed that class counsel won settlements in 16 out of 38 TCPA class actions over the last four years and collected handsome fees for 64% of the hours they devoted to TCPA litigation. Moreover, the court found only that this case was "slightly" more risky than typical TCPA litigation. A37. Nor did it reflect extraordinary litigation efforts: the case settled immediately after the filing of the MDL complaint. Nor did it reflect above-average efficiency: six firms claimed a right to fees, though only three had been appointed in the district court's original Rule 23(g) order, and the lodestar was substantially higher than in other TCPA cases. Nor is this an extraordinary settlement: class members' multiple $500 statutory claims were settled for about $4/class member before attorneys' fees. A6-7.

Collins does not contend that a court can never award such a generous hourly rate. But this Court has "held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Synthroid I*, 264 F.3d at 718. "When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market would set. … The judge, in other words, is trying to mimic the market in legal services." *Gaskill v. Gordon*, 160 F.3d 361 (7th Cir. 1998) (citations omitted). The judge "must step in

and play surrogate client." *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992).

It is inconceivable that a sophisticated buyer in a competitive marketplace would agree to such a windfall for counsel for such unexceptional results just because the class size was so large. Collins's expert witness, Professor M. Todd Henderson, performed an analysis that mimicked a hypothetical *ex ante* market in legal services in light of the risk of nonpayment and the normal rate of compensation in the market, and found that, making assumptions generous to class counsel, a competitive market would have produced qualified class counsel willing to accept a 4.6% contingent fee *ex ante*. A642-88.

The court agreed that Professor Henderson's conclusion of a 4.6% negotiated rate would possibly be a good predictor "in a competitive market of homogenous plaintiffs lawyers." A40. But the court nevertheless used a methodology—what had other courts awarded?—that unquestionably produced *ex ante* returns far above lodestar. It rejected the Henderson methodology because the Seventh Circuit had not expressly adopted it. A41. The premise is true, but the conclusion is a *non sequitur*: no court had ever expressly rejected the Henderson methodology, either, and the methodology is consistent with this Court's description of what it meant to mimic the market. *E.g.*, *Florin v. Nationsbank of Georgia*, NA, 60 F.3d 1245, 1248 (7th Cir. 1995) ("*Florin II*"); *Continental Illinois*, 962 F.2d at 569. Collins thus asks this Court to decide the question of first impression: should judges consider economic modeling of a competitive market when courts attempt to reconstruct a market?

The court held that the "court's job is to approximate the market as it existed before the litigation, including the degree of competition," and thus could not assume a

"competitive market" as Henderson did. A41. But a court *should* be approximating a competitive marketplace: *Synthroid I* expressly emphasized the desirability for a court to "see what levels of compensation attorneys are willing to accept in competition." 264 F.3d at 721. If nothing else, it is perverse to reward class counsel with a higher fee for colluding to reduce competition for the right to represent the class because that collusion shows lack of competition—and that is exactly what the district court did here. A41.

That questionable collusion reflects a second independent legal error. Rule 23(h) requires the district court to set the fee award. The Fifth Circuit holds it error for a district court to delegate the allocation of that fee award to a non-judicial third party. *High Sulfur*, 517 F.3d at 229. Here, the district court did not even review the allocation of the lump-sum fee award among six firms even *in camera*. If *High Sulfur* is correct, this is an impermissible abdication of a court's Rule 23(h) duty—and doubly so given the evidence in this case that previous fee allocation agreements outside courts' purview resulted in clear windfalls to free-riding law firms, possibly in exchange for their agreement not to compete for lead class counsel status.

Collins acknowledges that his argument in the alternative—the fee award is excessive under *Perdue v. Kenny A.*—is foreclosed by Seventh Circuit precedent, but preserves it for Supreme Court review.

**Standard of Review**

This Court will "review *de novo* the district court's methodology to determine whether it reflects procedure approved for calculating" Rule 23(h) awards. *Americana Art China v. Foxfire Printing*, 743 F.3d 243, 246 (7th Cir. 2014) (internal quotation

omitted). The fee determination itself is reviewed for abuse of discretion. *Id.* "Abuse of discretion occurs when the district court commits a serious error of judgment, such as the failure to consider an essential factor." *United States v. Lowe*, 632 F.3d 996, 997 (7th Cir. 2011). And "[a] district court by definition abuses its discretion when it makes an error of law." *Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003) (internal citation omitted).

A question of interpretation of the Federal Rules is a question of law reviewed *de novo*. *See, e.g., In re Baycol Prods. Litig.*, 616 F.3d 778, 782 (8th Cir. 2010); *cf. also Gaffney v. Riverboat Servs.*, 451 F.3d 424, 445 (7th Cir. 2006) (statutory interpretation).

## Argument

### I. The district court failed to "recreate the market" when it awarded attorneys' fees using a methodology shown to systematically produce above-market returns.

The fee award here paid $3571/hour in a case that settled for less than a penny on the dollar. Collins is not arguing that a $3571/hour result is never permissible. His complaint is not that the district court failed to "determine the equivalent of the medieval just price," but rather that a firm selling their "services in the market rather than being paid by court order" would never be able to achieve these results by arm's length negotiation with a sophisticated client. *Continental Illinois*, 962 F.2d at 568.

What was effectively a nuisance settlement here was large because the class was enormous, over 17 million people with billions of dollars of statutory claims. A sophisticated client would not have agreed to a contingency percentage of double

digits, and had there been *ex ante* bidding without collusion, there would have been a qualified firm happy to take the case for a small fraction of the 20.77% the district court eventually awarded. A market-mimicking methodology should reflect that fact.

**A. Mimicking the market for legal services.**

Courts "must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Synthroid I*, 264 F.3d at 718 (citing, *inter alia*, *Continental Illinois* and *Florin II*). The market price for legal fees "depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Synthroid I*, 264 F.3d at 721.

This Court has repeatedly explained what it means by the "risk of nonpayment," most thoroughly in *Continental Illinois*:

> Suppose a lawyer can get all the work he wants at $200 an hour regardless of the outcome of the case, and he is asked to handle on a contingent basis a case that he estimates he has only a 50 percent chance of winning. Then if (as under the lodestar method) he is still to be paid on an hourly basis, he will charge (if risk neutral) $400 an hour for his work on the case in order that his expected fee will be $200, his normal billing rate. If the fee award is to simulate market compensation, therefore, the lawyer in this example is entitled to a risk multiplier of 2 (2 × $200 = $400).

962 F.2d at 569; *accord Synthroid II*, 325 F.3d at 978 (7th Cir. 2003) (giving similar example of *ex ante* risk of 50% requiring double rates); *Florin II*, 60 F.3d at 1248 (awarding risk multiplier of 1.53 "which translates to a 34.6% risk of not being paid"); *see also Skelton v. General Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988).

> The object in awarding a reasonable attorney's fee … is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible. In other words the object is to simulate the market where a direct market determination is infeasible. It is infeasible in a class action because no member of the class has a sufficient stake to drive a hard—or any—bargain with the lawyer. So the judge has to step in and play surrogate client.

*Continental Illinois*, 962 F.2d at 572.

Where there is more than one firm willing to take on common-fund litigation, this Court has stated that *ex ante* selection is preferable, because "[f]orcing firms to bid at least approximates a market" and "a court can examine the bids and the results to see what levels of compensation attorneys are willing to accept in competition." *Synthroid I*, 264 F.3d at 720-21. But this Court has not required district courts to engage in *ex ante* fee determination, noting that it is too late after the fact to "invite other law firms to make other offers." *Silverman*, 739 F.3d at 948.

**B. The Henderson report, as a matter of law, applied Seventh Circuit law to "simulate the market," and the district court's refusal to credit it and its decision to award a total fee award of over 20% was legal error.**

**1. The Henderson methodology is just a mathematical formalization of *Synthroid I* and *Continental Illinois*.**

The Henderson report, using *Continental Illinois* as its baseline, simulated the market for TCPA litigation, considering specifically, what *Synthroid I* commanded: "the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." This was reduced to a mathematical formula:

$$Q * E(R)|S = (1/p) * E(L)|S * e$$

where

- Q is the contingency percentage a firm would demand in an *ex ante* negotiation;
- E(R)|S reflects the expected (*i.e.*, average) recovery if the case settles: the expected settlement value per class member times the number of class members (*i.e.*, "the stakes of the case");
- *p* is the weighted probability any lodestar dollar devoted to the case results in recovery (*i.e.*, "the risk of nonpayment a firm agrees to bear");
- E(L)|S reflects the expected lodestar devoted to the case to generate a settlement (*i.e.*, "the amount of work necessary to resolve the litigation");
- and *e* was a variable reflecting a risk premium for risk aversion.[6]

If attorneys achieved average results with average efficiency, then offering Q in an arm's length negotiation would mean that they would realize their lodestar: a (1/*p*) multiplier in the *p* hours that resulted in recovery, compensating them for their risk of loss. But this was no cap on multiplier or on attorney recovery: attorneys who achieved above-average results or litigated with above-average efficiency would realize results

[6] Henderson suggested that, in the case of plaintiffs' counsel, *e* would be approximately 1, and effectively drop out of the equation. A674-76; *accord In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 746 (7th Cir. 2011) ("a lawyer with a diversified portfolio of cases should not be risk averse"). While plaintiffs disputed this conclusion without addressing *Trans Union*, A869, plaintiffs never proposed an alternative value of *e*, provided an alternative methodology for determining *e*, or even suggested that *e* would be materially larger than 1 (*e.g.*, 1.1 or 1.2 instead of 1.01).

far above their lodestar across their portfolio of cases, thus reflecting *Synthroid*'s requirement to incorporate "the quality of [a firm's] performance" into the fee award.

The six law firms produced anonymized records of their lodestar and fee awards in successful and unsuccessful TCPA class actions that had concluded in the four years before the fee request in this case. A710-A822. Those records showed that (1) TCPA litigation was relatively low-risk, both in terms of likelihood of success and in terms of "the amount of work necessary to resolve the litigation,"[7] and (2) district courts were systematically overcompensating attorneys in TCPA litigation under the Seventh Circuit's metric.

| | Cases | Hours | Average blended rate | Average lodestar | Total lodestar |
|---|---|---|---|---|---|
| Successful | 16 | 20,132 | $487/hour | $613,333 | $9,813,329 |
| Unsuccessful | 22 | 11,885 | $473/hour | $255,402 | $5,618,837 |

Class counsel devotes considerably more lodestar to successful cases than to unsuccessful cases. As a result, 64% of lodestar investments in TCPA cases result in recovery. On average, only a modest multiplier is needed to fully compensate class counsel for the risk. But in the fourteen cases where class counsel had been awarded fees prior to *Capital One*, they received millions of dollars of windfalls overcompensating them for the actual risk they incurred:

[7] This is consistent with what outside observers have said: "The TCPA has become fertile ground for nuisance lawsuits because class action lawyers are often rewarded with quick settlements, even in cases without any merit, simply because litigation uncertainty and the potential financial exposure resulting from a bad decision are too great a risk for a company to bear." Monica Desai *et al.*, *A TCPA for the 21st Century*, 1 INT'L J. MOBILE MKTG. 75, 75-76 (2013).

| | Cases | Total lodestar | Fees received | Multiplier |
|---|---|---|---|---|
| Successful | 14 | $ 6,889,058 | $17,709,294 | 2.57 |
| Unsuccessful | 22 | $ 5,618,837 | 0 | 0 |
| **Subtotal** | **36** | **$12,507,894** | **$17,709,294** | **1.42** |

Those windfalls were exacerbated by the even larger windfalls here and in *HSBC*:

| | Cases | Total lodestar | Fees received | Multiplier |
|---|---|---|---|---|
| **Subtotal** | **36** | **$12,507,894** | **$17,709,294** | **1.42** |
| *Capital One* | 1 | $ 2,213,770 | $15,668,265 | 7.08 |
| *HSBC*[8] | 1 | $ 710,502 | $7,682,655 | 10.81 |
| **TOTAL** | **38** | $15,432,166 | $41,060,214 | 2.66 |

Though the odds of any given dollar of lodestar not being compensated were only 36%, district courts awarded over $41 million for the under $10 million of lodestar devoted to successful TCPA cases—a multiplier of over 4.18, which would only be appropriate if class counsel went uncompensated over 76% of the time. All in all, over the four years of concluded cases, class counsel realized 266% of their lodestar, an average blended rate of over $1275/hour, even including the cases that they lost and recovered nothing.

[8] The *HSBC* figures are only for the four firms in *HSBC* that produced data in this case; they billed 1493 of the 1845.2 hours submitted by all firms in *HSBC*. A644. The district court eventually awarded $9,495,000, or $5149/hour, though it held *HSBC* less risky than this case. 2015 U.S. Dist. LEXIS 23869. The fee allocation in *HSBC* was not disclosed (see Section II below), but for simplicity, we assume *pro rata*.

Given the 64% success rate of invested lodestar, Henderson calculated that a 1.57 multiplier (1/0.636) would be all that was needed to compensate class counsel *ex ante* for the risk incurred in bringing an average TCPA case. A643-44; A646-47; A664-66.

There is no easy way to calculate E(R)|S or E(L)|S *ex post*. But Henderson made a simplifying assumption: if one assumes that class counsel litigated *this* case with average success and average efficiency, one can plug in the actual settlement value of $75.5 million and the actual lodestar of $2.2 million into E(R)|S or E(L)|S variables of the model. A649-51; A676-83. When all that math is done, Q = 4.6%. *Id*. If multiple firms competed for this litigation *ex ante*, and one made an offer to take the case at a 30% contingent recovery, other firms would recognize the opportunity for a windfall, and iteratively offer to do the case for less to win the rights to a smaller windfall until the excess rents were competed away and the sophisticated purchaser of legal services was able to negotiate a 4.6% contingency fee at arm's length.[9] A672-73; A681-82; A686-87.

Note that these simplifying assumptions are ***generous*** to class counsel in this case. While a $75.5 million settlement is large, it reflects the fact that this ***class*** is large, 17.5 million members. A6. The *per capita* value per class member is worth less than $5, or less than 1% of statutory damages for a single TCPA claim. This is a below-average nuisance settlement. *Bayat v. Bank of the West*, 2015 U.S. Dist. LEXIS 50416, at *14 (N.D. Cal. Apr. 15, 2015) (disparaging TCPA settlement's "whopping 99.5% discount"); *cf. also Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952 (7th Cir. 2006).

Furthermore, there is no reason to think that this case was litigated with above-average efficiency. *First*, the lodestar is substantially higher than in other TCPA

[9] Such competition does not require a transparent auction to benefit the buyer. A658.

settlements (including over twice as high as *HSBC*); even the blended rate is higher, at $519/hour versus the $482/hour for average TCPA litigation. *Pearson v. NBTY, Inc.* criticized $538/hour as top-heavy. 772 F.3d 778, 781 (7th Cir. 2014). *Second*, with six law firms participating in this case, there was almost certainly duplication of effort. *Third*, the $2.2 million lodestar figure is likely inflated to include risk-free post-settlement confirmatory discovery and perhaps even multiple rounds of briefing and hearings by class counsel resisting the discovery Collins sought. We do not know for sure because the district court did not accept Collins's invitation to investigate the undisclosed makeup of the lodestar.

If one believes this case produced below-average results or was litigated with below-average efficiency, then the Henderson model prediction of a 4.6% *ex ante* market-based fee ***overstates*** the appropriate award to class counsel. (Conversely, if a district court found that the case was litigated with above-average results or above-average efficiency, then the 4.6% figure understates the *ex ante* market-based fee.)

Note that the Henderson model does ***not*** argue for a cap on the multiplier or that a high-percentage fee is never appropriate. If this were a much smaller class that required an expected $800,000 lodestar investment to produce an average $4 million settlement, the model might well produce an *ex ante* rate of 30%. For another example, if this had been an unusually successful settlement that won $100/class member instead of under $5/class member, the Henderson model would produce an even higher multiplier than class counsel received here. There is thus no inconsistency between Collins's argument and *Williams v. Rohm & Haas Pension Plan*. 658 F.3d 629, 636 (7th Cir. 2011) (rejecting objection arguing for *per se* cap on multiplier). Nor is the model an argument for a megafund cap, as opposed to contextual consideration of the stakes of the case as

*Synthroid I* commands. For example, if the class was 160,000 members, rather than 16 million members, and class counsel produced a $75.5 million settlement, a 30% award might well be appropriate *ex ante*. But in this case, with a gigantic class, if class counsel's results and efficiency are average, *ex ante* market analysis means they are not entitled to more than 4.6% of the gross fund.

Under *Continental Illinois* and *Synthroid I* and related cases, the Henderson model is the correct methodology for reconstructing the market as a matter of law. That does not require a district court to adopt Henderson's *conclusions* of a 4.6% contingent fee—the methodology is flexible enough to permit adjustments in the results if a court believes the case was litigated with above- or below-average efficiency or achieved above- or below-average results or (as the court held at A37) had different risk than average. A633-34; A636; A648; A651. But rejecting the mathematical model itself means doing something other than what *Continental Illinois* and *Synthroid I* anticipated when asking courts to reconstruct the market.

But even if the district court had the discretion to reject Henderson's model and choose a different one for reconstructing the market, the district court did so here for the wrong reason: it thought it did not have the authority to use the Henderson approach at all. "[Henderson's] model is not among the methods accepted by the Seventh Circuit." A41. This is legally erroneous: Henderson was simply mathematically codifying what *Synthroid* and *Continental Illinois* and other Seventh Circuit cases said about market reconstruction. This Court has never had occasion to reject the Henderson model, because no objector has previously acted on behalf of absent class members to demonstrate the degree to which courts had been providing above-market returns to class counsel for relatively low-risk litigation. *Cf. Continental Illinois*, 962 F.2d at 573

("No class member objected either—but why should he have? His gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule."). Nothing in Seventh Circuit law precludes Henderson's model, even if this Court disagrees that it must be applied to mimic the market as a matter of law.

A district court failure to exercise discretion that it has is in itself reversible error. *United States v. Jaroszenko*, 92 F.3d 486, 491 (7th Cir. 1996) (Sentencing Guidelines); *United States v. Abbott*, 30 F.3d 71, 73 (7th Cir. 1994) (same). Thus, at a minimum, remand is required because the district court erroneously thought that Seventh Circuit law precluded it from using the Henderson model.

**2. The other reasons suggested by the district court for rejecting the Henderson report are legally or otherwise clearly erroneous.**

The other reasons the district court gave for refusing to apply the Henderson methodology are invalid or contradict Seventh Circuit law.

**Competition**: When Professor Henderson reconstructed the *ex ante* market, his calculation of the arm's-length negotiation between sellers and a sophisticated buyer assumed that the six law firms seeking fees would compete for lead-counsel status, and that the resulting *ex ante* price would reflect that competition. A658; A672-73. The district court, however, thought that the "court's job is to approximate the market as it existed before the litigation, including the degree of competition. In doing so, the court cannot assume a perfectly competitive market…" A41. This is a misunderstanding of the market-mimicking test, and by itself independent reversible error.

The Seventh Circuit has *always* assumed that its reconstruction of the *ex ante* market would involve competition; its very definition of a "market" involved competition: "Forcing firms to bid at least approximates a market." *Synthroid I*, 264 F.3d

at 720. *Synthroid I* noted that the reason to treat auction cases as a third benchmark was "to see what levels of compensation attorneys are willing to accept in competition." *Id.* at 721. *Silverman* further suggests that the Seventh Circuit's intent in its market-mimicking test was to introduce the element of competition into the analysis. *Silverman* thought it significant that the plaintiffs' firm bringing the suit was the only firm "willing to serve as lead counsel." 739 F.3d at 958. This was not just evidence of "lack of competition" "impl[ying] a higher fee but also suggests that" the case was unusually risky, itself requiring a higher fee. *Id.* But neither is true in this case where six firms were willing to bring lawsuits, especially in a field of law that does not require "$5 million in out-of-pocket expenses" (*id.*) and where cases tend to settle quickly. One advantage of *ex ante* fee-setting is that it permits a court to "invite other law firms to make other offers," even if there was only one firm willing to bring the litigation at first; trying to do so *ex post* is too late. *Id.*

Even if, as a positive matter, the market-mimicking test precedent is ambiguous as to whether it assumes a competitive market, as a normative matter, this Circuit's test ***should*** assume competition where more than one firm brought more than one class action. The alternative creates a perverse incentive for potentially competing class counsel to collude at the expense of the class. This is not just because to do so eliminates the risk of *ex ante* competition reducing fees from above-market rates, but because then, at the *ex post* stage, class counsel can ask the district court to do what it did here: use the fact of anticompetitive collusion to infer that a market is not "highly competitive" and then award higher fees accordingly. That is the equivalent of sentencing a man who murdered his parents and reducing the sentence because the defendant is an orphan.

The Seventh Circuit's test assumes "the *normal* rate of compensation in the market." *Synthroid I*, 264 F.3d at 718 (emphasis added). Class counsel should not be rewarded with above-market fees through their own actions in eliminating competition just because the district court failed to conduct the *ex ante* fee setting and bid invitations this Court has held preferable.[10]

**Henderson's data set**: Henderson used a four-year snapshot of class counsel's TCPA litigation to calculate the *ex ante* risk: the "*p*" variable in his model. When Collins requested discovery of this data, class counsel protested that it was too burdensome to produce data as far back as October 2010. A526. After Henderson released his report, class counsel changed their argument, now stating that any data from after the first of the competing class actions was filed in August 2011 was irrelevant, and Henderson should have relied on earlier data. Dkt. 302 at 4. The district court agreed: "That is not a criticism of Professor Henderson's methodology—he had no choice because he was limited to the data available through discovery. The limitation, however, does

[10] It is also a reason why district courts should be *required* to take competitive bids *ex ante* when there is a sizable class action with large stakes. Collins recognizes that current Circuit law holds that the district court's failure here to establish *ex ante* pricing is not an abuse of discretion. *Silverman*, 739 F.3d at 958. Given those settled expectations and the impossibility of retroactively unscrambling this omelet, Collins does not argue that the district court in this case abused its discretion in choosing to award fees *ex post* and failing to set fees *ex ante* through a competitive process as *Synthroid I* strongly recommends. But given (1) this Court's acknowledgment that *ex ante* determination is superior to *ex post* reconstruction, and (2) the strong empirical evidence that *ex ante* competition returns a greater share of money to class members (A28-A33), Collins sees no reason that future district courts should have the discretion to choose the inferior process when not required by law to do so.

undermine the applicability of Professor Henderson's model to this case. Class Counsel did not know, at the outset of the litigation, that they needed only to achieve a 1.57 lodestar multiplier to compensate themselves for the contingent risk, and accordingly could not have relied on that multiplier to formulate their hypothetical ex ante bid for the legal work in this case." A41. But this is error on two accounts.

*First*, the data set does not affect the validity of the model; it affects only the calculation of the "*p*" variable in the model. The model works just as well if one determines a different *ex ante* value for *p*, which the market-mimicking model requires regardless. The model will produce different conclusions with a different input value of *p*, but nothing in the model requires *p* to be 0.64 or be based on the four-year slice of data Henderson used. Indeed, the district court independently adjusted *p*. A37-38; *see* Section I.B.3 below. If Henderson's conclusions were based on the wrong data, the correct solution was to rely on the "right" data or perform some other adjustment.

*Second*, there was no evidence that Henderson's use of the October 2010-October 2014 snapshot was the wrong data or produced an incorrect value of *p*. The fact that Henderson calculated *ex ante* probabilities based on data that arose after complaints were filed in this case is only relevant if the *ex ante* chance of success in 2011 or 2012 was different than the observed level of success for the 2010-14 snapshot. The six firms had within their possession their record of success from the previous decade: had the evidence been favorable to their argument, they could have presented complete data to show that their 2010-14 results were atypical relative to other eras. Class counsel could have identified post-complaint legal developments that changed the landscape of TCPA litigation, or innovations they used to produce above-average *ex post* results; they

identified none that indicated that Henderson overestimated *p*.[11] There was no reason to reject Henderson's assumption that an *ex post* snapshot of class counsel's portfolio provided a rough estimate of the *ex ante* probabilities. Indeed, the plaintiffs' fee request relied upon post-2011 cases, as did the court. A219-20; A224-27; A835; A26-28; A46-49; *see also* A827 (citing adverse 2014 district-court decision as evidence of risk). Moreover, an adverse inference should have been drawn against class counsel given their own use of post-2011 cases as evidence of the *ex ante* market, their earlier position on discovery, their refusal to identify a different value for *p,* their failure to present evidence in their possession rebutting Henderson's calculations, and their burden in moving for fees. *Cf. In re Dry Max Pampers Litig.*, 724 F.3d 713, 718-19 (6th Cir. 2013) (drawing adverse inference against settling parties on question of settlement fairness when they chose not to present evidence in their possession).

**Homogeneity**: One more point in anticipation of a possible counterargument by plaintiffs: the district court noted, implicitly disapprovingly, that Henderson's model assumed "homogenous counsel." A40. Perhaps plaintiffs will protest that "quality varies among lawyers." *Synthroid I*, 264 F.3d at 720.[12] But it is important to recognize

[11] Indeed, the settling parties argued that TCPA litigation became *more* risky over time because of possible FCC action providing a safe harbor for defendants or retroactively revising regulations, a fact the district court adopted. A36. If that's so, then Henderson *underestimated* his *ex ante* value of *p*, and class counsel was entitled to a *lower* multiplier than the 1.57 Henderson calculated.

[12] To do so would be an admission that it was error to appoint six law firms to fee entitlement (and three under Rule 23(g)(3)), rather than the highest-quality one or two of them, and that class counsel litigated the matter deliberately inefficiently. Class counsel never argued below that there were material differences between the quality of the six firms, and should be judicially estopped from doing so now.

that, contrary to the district court's aside, nothing in the Henderson model requires the simplification of fungible counsel, and that the model is robust enough to account for heterogenous counsel. If class counsel in this case vary in quality, the Henderson model would produce *lower* contingency fee percentages than what Henderson concluded in his report with its simplifying assumption of homogenous counsel. If counsel is of varying quality in their ability to achieve a nuisance TCPA settlement like the one here, then the firms that can litigate more effectively or more efficiently than the average bidder will have higher values for *p* and E(R) or lower values for E(L) than that average bidder, and win the competitive bidding process by being willing to underbid the merely average firms. If Henderson's conclusion is deemed problematic because it uses an unrealistic assumption of homogenous firms, that is a reason to *depart downward* from Henderson's conclusions, rather than to reject the model entirely. The assumption of homogenous counsel was a simplifying assumption that was generous to the proposed payment to class counsel.

The district court's rejection of the Henderson model was reversible error.

**3. The district court erred in holding that this litigation was riskier than average TCPA litigation, but even assuming *arguendo* that its premise was not clearly erroneous, its resulting conclusion is a *non sequitur*.**

Henderson estimated *p* to be 0.64 because, though class counsel win fewer than 64% of their cases, the relevant issue is whether they will be reimbursed for their opportunity cost of litigating, and the evidence showed that, for whatever reason, class counsel was savvy enough to invest more lodestar in successful cases than in unsuccessful cases, and incurred 64% of its lodestar in cases where they recouped fees.

A664-65; A670-72; A678-85.[13] The district court disagreed and held that the relevant number was 0.43, "unadjusted for Class Counsel's investment savvy" because of the court's "concern[] with the riskiness of this case relative to other TCPA cases." A37 & n.14. It held that this case was "slightly" riskier than an average TCPA case. A37. But the elements of risk that the district court identified—the affirmative defense of consent, the difficulties of class certification, the possibility of a change in FCC regulations abrogating the theory of the suit—are common to nearly *every* TCPA cell-phone case, and are not unique to this one. *E.g., Rose v. Bank of America Corp.*, 2014 U.S. Dist. LEXIS 121641, *32, *34 (N.D. Cal. Aug. 29, 2014) (identifying two of same three issues as reasons for fairness of settlement) (awarding 2.59 multiplier of a lodestar reduced because law firms duplicated effort, for under 8% of $32 million common fund); A224-27; A38. Every defendant facing billions of dollars of liability in TCPA is going to petition or threaten to petition the FCC for a waiver, even if only for leverage in settlement negotiations. And Capital One lacked an arbitration defense. *Compare Brown v. DIRECTV, LLC,* 2013 U.S. Dist. LEXIS 90894 (C.D. Cal. June 26, 2013).

[13] This difference could be because class counsel knows how to pick a winner, and pours additional resources into more promising cases or withholds resources until they seem likely to lead to success; because successful cases involve risk-free time commitments not needed in unsuccessful cases (including additional lodestar on "confirmatory discovery" or on papering the settlement once it becomes clear that recovery is certain (*cf.* A215; A228)); because unsuccessful cases end more quickly than successful cases; because counsel engages in makework to inflate lodestar once a case has settled to rationalize its eventual fee request (*e.g., In re Citigroup Sec. Litig.*, 965 F.Supp.2d 369, 391-92 (S.D.N.Y. 2013)); or some combination of the above. But the difference is too large to be one of mere chance.

Furthermore, even if it was the situation that the litigation was exceptionally risky up front, many or most hours were expended with next to no risk at all. *Cf. Continental Illinois*, 962 F.2d at 569 ("the risk of loss varies over the life of a case"). It is almost certainly the case that the vast majority of hours were spent in settlement discussions, post-settlement confirmatory discovery, or papering the settlement and fee motions before the court—all but risk-free litigation. A215; A228. But we do not know that breakdown, because the district court did not inquire into what made up the 4258 hours attributed to $2.2 million of lodestar.

So the district court's reasoning is erroneous. Whether that error rises to the level of clear error or abuse of discretion is, admittedly, a closer question. *Compare Trans Union*, 629 F.3d at 746-47 (rejecting district court's assessment of *ex ante* risk) *and Florin II*, 60 F.3d at 1248-49 (same, setting "appropriate risk multiplier" as 1.53 for "uphill fight" in "unsettled and complex" area of law) *with Williams*, 658 F.3d at 636-37 (deferring to district court's assessment after eight years of experience with ERISA litigation as "rough justice").

But even if one credits the district court's conclusion that the relevant *ex ante* figure for chances of success in TCPA litigation is 43% per case rather than the 64% chance per lodestar dollar, and even if one further credits that that *ex ante* figure is to be reduced "slightly" to something in the 40% range, the district court's results from those premises are still reversible error. A 40% *ex ante* chance of success implies that the *ex ante* need is for a multiplier in the 2.5 range, not the 10.2 class counsel sought or the 7.1 the district court awarded. *Florin II*, 60 F.3d at 1248; *Continental Illinois*, 962 F.2d at 569. Under the Seventh Circuit's methodology, a seven multiplier implies a chance of

success of under 15%; a multiplier over 10 implies a chance of success of under 10%.[14] And even that 2.5 figure assumes that 4258 hours of time deserves no reduction for inefficiency or for riskless post-settlement activity.

The district court's fee award is inconsistent with its own assessment of the risk of the case and is independently clearly erroneous, whether or not the district court's erroneous assessment of the risk of the litigation rises to the level of reversible error by itself.

**4. Reliance on previous district-court decisions is not reconstructing the market when evidence shows that those decisions are over- or undercompensating class counsel relative to the market.**

The district court performed an admirable empirical survey of TCPA class-action settlements across the nation in reaching its decision. If all the Seventh Circuit means when it asks district courts to "mimic the market" is to award a percentage fee in the general range of what other district courts have done, there can be no complaint with the district court's decision. But this is legally incorrect for at least two reasons.

*First,* the Seventh Circuit has repeatedly reversed district courts that relied on out-of-circuit district-court precedents to reach a proposed percentage fee. *Synthroid I* criticized a district court for following "decisions of district courts in other jurisdictions, rather than … the Seventh Circuit. For the approach that these districts take, and that our district judge followed, cannot be reconciled with the approach our opinions adopt." 264 F.3d at 718. The Seventh Circuit thinks its approach is unique. *E.g., id.* at 719

[14] And even then, some Seventh Circuit cases have suggested a large multiplier is inappropriate because it would incentivize counsel to take longshot cases. *Skelton*, 860 F.2d at 253; *id.* at 258 (suggesting "doubling" as a "sensible ceiling"). *Contra Williams*, 658 F.3d at 636.

(criticizing Second Circuit test's "random and potentially perverse results"). If so, then bootstrapping off of other circuits' decisions (and empirical research into awards in non-TCPA cases) defeats the purpose of a command to mimic the market. *Cf. Trans Union*, 629 F.3d at 746-47 (7th Cir. 2011) (criticizing figure "plucked out of a hat, and a hat with three holes in it").[15]

*Second*, just as "the failure to make any provision for risk of loss may result in systematic undercompensation of plaintiffs' counsel," *Continental Illinois*, 962 F.2d at 569, the failure to account for the degree to which certain types of cases involve relatively low risk and opportunity cost can result (and has resulted) in systematic *overcompensation* of plaintiffs' counsel. For any given hour invested in a TCPA case, class counsel has a better than even chance of recovering attorneys' fees, suggesting that a multiplier under two is needed to compensate class counsel for average results, but courts have treated these cases as if multipliers of three, four, seven, or even ten are appropriate, especially when no objectors protest. *Sakiko Fujiwara v. Sushi Yasuda Ltd.*, 2014 U.S. Dist. LEXIS 159140, at *19-*20 (S.D.N.Y. Nov. 12, 2014) (lamenting that "class action bar is in fact creating its own caselaw on the fees it is entitled to" through rubber-stamped proposed orders) ("No wonder that 'caselaw' is so generous to plaintiffs' attorneys.").

The evidence here was that TCPA litigation requires less investment and opportunity cost than securities or antitrust cases, and that earlier TCPA fee awards

[15] Below, Collins proposed the *Synthroid II* declining percentages as a less-wrong alternative to class counsel's proposed 30% flat rate fee, A451-52, but made clear that he was arguing the Henderson model was superior to both, and that this case involved considerably less risk and opportunity cost than *Synthroid II*. A452-55; A627-36.

systematically and consistently overcompensate class counsel. It was error to mimic the market without taking the resulting windfalls to class counsel into account.

**5. Public policy supports a fee reduction.**

*Murray* criticized a nuisance settlement of a class action with uncapped statutory damages where "class members get relief worth about 1% of the minimum statutory award." 434 F.3d at 952. "[I]f the chance of success really is only 1%, shouldn't the suit be dismissed as frivolous and no one receive a penny?" *Id.* For now, Collins does not challenge the right of Capital One to free itself from the speculative threat of bankrupting liability with a nuisance settlement reflecting the low chances of success of the litigation. If risk-averse defendants cannot settle low-merit high-stakes litigation for a penny on the dollar, they're forced into a game of chicken or to settle a case for more than it's worth. But *Murray* does suggest that this sort of low-merit *in terrorem* litigation should be discouraged, rather than incentivized with payment of thousands of dollars an hour.

* * *

An *ex ante* market negotiation would not have agreed to a fee structure that would pay class counsel $3571/hour for such unexceptional results. It was error for the district court to adopt a methodology that failed to recognize this, and to reject a model consistent with Seventh Circuit precedent that formalized this principle.

## II. It violated Rule 23(h) for the district court to delegate the allocation of the fee award amongst six law firms to the terms of an undisclosed side agreement.

The intentional lack of competition complained of in Section I.B.2 above has other consequences. There were three competing class actions involving six law firms

consolidated in the MDL. But when it came time to make a Rule 23(g) appointment of interim class counsel, only three of the six law firms stepped forward in an unopposed motion. Dkt. 11. Then, when the case settled, all six law firms showed up to make the fee request—but asked for a single lump sum of 30% of the common fund to be secretly divided amongst themselves. The district court's acquiescence in this procedure and award of a single lump sum to be divvied up privately in the face of what it itself implied was anti-competitive collusion (A41) was an impermissible abdication of its role under Rule 23(h). This is reversible error, especially given the undisputed evidence that previous private fee-division agreements in TCPA settlements provided windfalls to attorneys who contributed little to the proceedings. *See* pp. 13-14, above.

Even aside from the damning circumstantial evidence, we know that there was *some* side agreement here: class counsel opposed discovery of that side agreement rather than claim that the side agreement did not exist and thus could not be produced. Dkt. 279 at 8-10.

Rule 23(h) authorizes the Court to award "reasonable" attorneys' fees only when notice of the fee request is "directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h), (h)(1); *Redman v. RadioShack Corp.*, 768 F.3d 622, 637-38 (7th Cir. 2014). "Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances." Notes of Advisory Committee on 2003 Amendments to Rule 23. "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process." *Id.* And Rule 23(e)(3) requires that "The parties seeking approval must file a statement identifying any agreement made in connection with the proposal."

It is not sufficient that class members are able to make "generalized arguments about the size of the total fee"; the notice must enable them to determine which attorneys seek what fees for what work. *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). The fee request in this case lacks basic information; it fails to provide even the bare bones of who seeks what, instead providing for lump sum for class counsel to distribute amongst themselves. This extra-judicial award undermines Rule 23(h)'s policy of "ensur[ing] that the district court, acting as a fiduciary for the class, is presented with adequate, and adequately-tested, information to evaluate the reasonableness of a proposed fee." *Id*.

As the Fifth Circuit noted: "In a class action settlement, the district court has an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel." *High Sulfur*, 517 F.3d at 227. The district court "must not … delegate that duty to the parties." *Id.* at 228 (internal quotation omitted). The appellants in *High Sulfur*, attorneys dissatisfied with their share, complained that the district court had sealed the fee allocation list, such that they could not compare their fee awards to those of other attorneys. The Fifth Circuit agreed: "One cannot compare apples to oranges without knowing what the oranges are." *Id.* at 232.

That court also held that it was impermissible for the district court to defer to the allocation proposed by the attorneys themselves.

> "It is likely that lead counsel may be in a better position than the court to evaluate the contributions of all counsel seeking recovery of fees. But our precedents do not permit courts simply to defer to a fee allocation proposed by a select committee of attorneys, in no small part, because 'counsel have inherent conflicts.' As Judge

> Ambro noted, 'They make recommendations on their own fees and thus have a financial interest in the outcome. How much deference is due the fox who recommends how to divvy up the chickens?'" [*Id.* at 234-35 (quoting *In re Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143, 173 (3d Cir. 2005).]

The *High Sulfur* fee agreement is comparatively inoffensive to the one here: in *High Sulfur,* at least the district court judge had the fee committee's recommendation available. Here the allocation in this case is made in an *out of court* backroom agreement among class counsel without *any* judicial involvement. It is impossible to reconcile this with the *High Sulfur* requirement that the allocation of fee awards be done openly by the court.

In a case predating Rule 23(h), the Second Circuit similarly "reject[ed] this authority… to the extent it allows counsel to divide the award among themselves in any manner they deem satisfactory under a private fee sharing agreement." *In re "Agent Orange" Prods. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir. 1987). "Such a division overlooks the district court's role as protector of class interests under Fed. R. Civ. P. 23(e) and its role of assuring reasonableness in awarding of fees in equitable fund cases." *Id.* The Second Circuit decreed that "in all future class actions counsel must inform the court of the existence of a fee sharing agreement at the time it is formulated." *Id.* at 226.

There is no reason to treat *High Sulfur* as applying only to inter-attorney disputes and not to attorney-class disputes, and several good reasons why public policy should require a court to be the one doing the allocation of fees. *First*, if one of the law firms has secretly agreed to accept less than its lodestar or to a smaller multiplier than is being requested from the Court, it is the class that is entitled to that giveback, not the law firm that has secretly extracted a return greater than that approved by the Court. *Cf. Pearson,*

772 F.3d at 786; *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) (givebacks to parties instead of class is a sign of impermissible self-dealing because "there is no apparent reason the class should not benefit from the excess allotted for fees"). Perhaps one firm is entitled to a larger multiplier of its lodestar than another firm, or a disproportionate share of the lump sum awarded to counsel, but those reasons should be tested in court. *Cf. Manual for Complex Litigation, Fourth* § 14.11 at 186; *see also generally* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. Rev. 71 (2015) (illuminating repeat-player phenomenon and concluding that fees should be allocated "through a transparent process, not through the backdoor of settlement").

*Second*, permitting secret side agreements and allocation of fees deprives the class of the benefits of competition. This case presents multiple competing class actions bringing similar or identical causes of action. When courts require attorneys to compete for lead class counsel status, the class benefits from proposals that substantially improve the results obtained for the class while substantially reducing the fees the class pays for those results. *In re Comdisco Sec. Litig.*, 150 F.Supp.2d 943, 947 n.7, 950 (N.D. Ill. 2001); A28-32; *see generally Synthroid I*, 264 F.3d at 719.

The agreement among the six law firms not to compete here may or may not violate the antitrust laws. Joseph Ostoyich and William Lavery, *Looks Like Price-Fixing Among Class Action Plaintiffs Firms*, Law360 (Feb. 12, 2014), http://www.law360.com-/articles/542260/looks-like-price-fixing-among-class-action-plaintiffs-firms. But the district court's failure to supervise it violated Rule 23(h) and requires reversal of the fee award.

## III. In the alternative, "reasonable" under Rule 23(h) requires a cap of lodestar in the absence of extraordinary circumstances.

As a normative question of first principles, Collins agrees that the optimal way to set fees in a large class action is *ex ante*. Such an *ex ante* approach not only saves effort and avoids self-serving assessments on the back end, but has the additional advantage of providing the district court important signaling information in the Rule 23(g) class-counsel selection process. The second-best rule when it is too late to engage in *ex ante* fee setting is *ex post* market reconstruction—***if*** market reconstruction is actually a reconstruction of a competitive *ex ante* process like the Henderson model, and not merely another name for an arbitrary award of fees based on what earlier district courts did. As Henderson's report shows (and cases like *Comdisco* noted over a decade ago), the latter methodology has systematically overcompensated class counsel in TCPA cases relative to the risk incurred. But if this Court disagrees with Collins and holds that, notwithstanding the resulting windfalls, market reconstruction does not require consideration of evidence of the prices a competitive process would produce, Collins argues in the alternative that Supreme Court precedent abrogates that interpretation of the market-reconstruction test and requires the application of lodestar in TCPA and other Rule 23(h) cases.

In *Perdue v. Kenny A.*, 559 U.S. 542, 130 S.Ct. 1662, 1669 (2010), the Supreme Court reaffirmed that with respect to the calculation of an attorney's fee under federal fee-shifting statutes, "there is a strong presumption that the lodestar is sufficient." There are reasons to think the Supreme Court would apply *Perdue* to fees in TCPA settlements and hold that "reasonable" in 42 U.S.C. § 1988 means the same thing as "reasonable" in Rule 23(h). The Supreme Court would disapprove of a market-mimicking legal

standard if it produced the sort of returns that occurred here, stating that § 1988 was "not designed as a form of economic relief to improve the financial lot of attorneys." *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*, 478 U.S. 546, 565 (1986); *see also Riverside v. Rivera*, 477 U.S. 561, 580 (1986).

True: *Perdue*'s lodestar approach exacerbates agency problems and encourages socially-wasteful litigation churning and even fraudulent billing. On the other hand, the Supreme Court considered those drawbacks to lodestar methodology (*e.g., City of Burlington v. Dague,* 505 U.S. 557, 566 (1992)) and held those flaws were outweighed by the interest of being "ready administrable" and "objective"; and the interests of avoiding "burdensome satellite litigation," and "more complex and arbitrary" fee determinations that "yield[] minimal guidance, disparate results, and unlimited discretion." *Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 641 (7th Cir. 2011).

What the Supreme Court has consistently held critical in § 1988 was the need to provide sufficient incentive for attorneys to bring civil rights litigation so that plaintiffs are "adequately represented, not to provide… a windfall." *Perdue*, 130 S.Ct. at 1677 n.8. How can it be that the Supreme Court intended that TCPA claims were to be viewed as more important than civil-rights claims? One need not even rely solely on a gut reaction to the absurdity of the implicit value judgment; the statutory text supports the conclusion that Congress believes civil rights claims more important than TCPA claims because the TCPA does not even have a fee-shifting provision. 47 U.S.C. § 227(b)(3). The TCPA should not be treated as superior to § 1988 by the happenstance that the TCPA's statutory damages combined with a large class creates *in terrorem* settlements with large common funds. *Cf. In the Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

A settlement for $4/class member of $500 statutory claims is not "extraordinary," at least not "extraordinary" in a good way, no matter the size of the class. *Perdue* would imply that no multiplier is appropriate, much less the sevenfold multiplier here. If this Circuit's market-mimicking test permits the unlimited discretion of what the district court awarded here in the face of the evidence and circumstances of this case, then the market-mimicking test runs afoul of *Perdue* and the fee award must be reversed.

That said, Collins acknowledges that this Court effectively rejected this position in *Florin I*, which held that *Perdue's* predecessor *Dague* does not apply to common-fund cases such as this one. 34 F.3d at 564. Collins further acknowledges that reversing *Florin I* won't cure a circuit split. *E.g.*, *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1266-71 (D.C. Cir. 1993). Collins thus concedes that, under this circuit's precedents, this combination of circumstances means that "*stare decisis* supports standing pat" until the Supreme Court intervenes. *E.g.*, *United States v. Davis*, 714 F.3d 474, 475 (7th Cir. 2013). Collins raises the question to preserve the issue for possible Supreme Court review if his appeal does not succeed on other grounds.

## Conclusion

The fee award should be vacated, and the case remanded for calculation of fees based on a reconstruction of a competitive market with sophisticated purchasers to preclude the sort of windfalls realized in other TCPA litigation and in this fee award. On remand, class counsel should be required to disclose all side agreements relating to the Rule 23(g) selection process and fee allocation, and the district court should supervise the allocation of the Rule 23(h) fee award. The district court on remand

should also determine to what extent the claimed $2.2 million lodestar was devoted to the risky parts of the litigation.

Dated: May 4, 2015

Respectfully submitted,

CENTER FOR CLASS ACTION FAIRNESS

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**Statement Regarding Oral Argument**

Collins requests under Cir. R. 34(f) that the Court hear oral argument in his case because it presents significant issues concerning fee requests in class action cases. These issues, regarding the requirements of Fed. R. Civ. P. 23(h), are meritorious, and many have not been authoritatively settled in the Seventh Circuit. Exploration at oral argument would aid this Court's decisional process and benefit the judicial system.

Attorneys with the non-profit public-interest law-firm Center for Class Action Fairness are representing Collins *pro bono*. Dkt. 208-1. The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements. It has won tens of millions of dollars for class members, and acclaim from the press and this Court. *See, e.g., Pearson v. NBTY, Inc.*, 772 F.3d 778, 780, 787 (7th Cir. 2014); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013. The Center for Class Action Fairness has never settled an appeal for a *quid pro quo* payment, and brings Collins's objection and appeal in good faith to overturn an excessive fee award.

Collins's counsel has previously argued and won landmark appellate rulings improving the fairness of class-action and derivative settlement procedure, including four times in this Circuit. A favorable resolution in this appeal would provide guidance to district courts in assessing future fee requests, and reduce the windfalls achieved by class counsel at the expense of class members.

**Certificate of Compliance**

**with Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 30(d)**

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, Type Style Requirements, and Appendix Requirements:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 13,892 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and Microsoft Word for Mac 2011 in 12-point Palatino Linotype font.

3. All materials required by Cir. R. 30(a) & (b) are included in the appendix.

Executed on May 4, 2015.

*/s/ Theodore H. Frank*

Theodore H. Frank

**Proof of Service**

I hereby certify that on May 4, 2015, I caused to be electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing under Cir. R. 25(a).

In addition, I hereby certify that on May 4, 2015, I caused a copy of the foregoing to be sent by first-class mail to the following address:

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*/s/ Theodore H. Frank*
Theodore H. Frank

# Required Short Appendix

**Statement of Compliance**
**with Circuit Rule 30(d)**

All materials required by Cir. R. 30(a) & (b) are included in the Appendix of Appellants Jeffrey Collins, Vanessa FV VanWieren, Mary Smith Tweed and Antonia Carrasco.

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Exhibits to
Expert Report of M. Todd Henderson
filed December 5, 2014 (Docket No. 294), continued:

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | |
|---|---|
| IN RE CAPITAL ONE TELEPHONE CONSUMER PROTECTION ACT LITIGATION, | Master Docket No. 12 C 10064<br>MDL No. 2416 |
| BRIDGETT AMADECK, et al.,<br><br>v.<br><br>CAPITAL ONE FINANCIAL CORPORATION, and CAPITAL ONE BANK (USA), N.A. | No. 12 C 10135 |
| NICHOLAS MARTIN, et al.,<br><br>v.<br><br>LEADING EDGE RECOVERY SOLUTIONS, LLC, and CAPITAL ONE BANK (USA), N.A. | No. 11 C 5886 |
| CHARLES C. PATTERSON,<br><br>v.<br><br>CAPITAL MANAGEMENT SERVICES, L.P. and CAPITAL ONE BANK (USA), N.A. | No. 12 C 1061 |

**MEMORANDUM OPINION AND ORDER**

JAMES F. HOLDERMAN, District Judge:

The three above-captioned, nationwide class actions were filed against Capital One, its subsidiaries, and its Participating Vendors (collectively, "Defendants"),[1] as a result of the

[1] Capitol One includes defendants Capital One Bank (USA), N.A., Capital One, N.A., Capital One Financial Corporation, Capital One Services, LLC, and Capital One Services II, LLC. The Participating Vendors include defendants Capital Management Services, LP ("CMS"), Leading Edge Recovery Solutions, LLC ("Leading Edge"), and AllianceOne Receivables Management, Inc. ("AllianceOne").

Defendants' allegedly using automatic telephone dialing systems or artificial or prerecorded voice messages to contact consumers' cell phones without prior express consent, in alleged violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A). (Dkt. No. 120.) On December 10, 2012, the United States Judicial Panel on Multidistrict Litigation (the "JPML") selected this court to coordinate pursuant to 28 U.S.C. § 1408 the pretrial proceedings in these three class actions, along with other individual lawsuits filed throughout the United States. (Dkt. No. 1.) The cases filed outside this district were transferred to this district and assigned to this court's calendar. On February 28, 2013, Plaintiffs filed a Consolidated Master Class Action Complaint ("Master Complaint") superseding the complaints filed in the three class actions. (Dkt. No. 19.) On June 13, 2014, after reaching a settlement in principle, Plaintiffs filed an Amended Consolidated Master Class Action Complaint ("Amended Master Complaint"). (Dkt. No. 120 ("Am. Compl.").)

On July 29, 2014, the court granted Plaintiffs' unopposed request for preliminary approval of class settlement,[2] (Dkt. No. 129), and entered an Order (Dkt. No. 137) conditionally certifying a settlement class, preliminarily approving the class action settlement, approving the notice plan, and appointing a claims and notice administrator. Since then, the parties have filed memoranda in support of Plaintiffs' motion (Dkt. No. 260) for final approval of the class action settlement. Class Counsel, consisting of the attorneys who collectively represent the class, have also filed a motion for approval of attorneys' fees and for service awards to the class representatives (the "Named Plaintiffs"). (Dkt. No. 175.) Fourteen people out of the more than

[2] Plaintiffs never filed a proper motion for preliminary approval, although they filed two memoranda in support of such a motion. (Dkt. Nos. 121, 129.) They captioned the memoranda as "motions" in the docket text, but the actual headings of the filings reveal that neither is a motion, merely a memorandum. The court ignored Plaintiffs' oversight in light of the need for a standalone order (Dkt. No. 137) granting preliminary approval.

17 million settlement class members filed briefs or statements in opposition to the Amended Settlement Agreement and Release ("Settlement Agreement") (Dkt. No. 131 Ex. 1) and Class Counsel's requested fee award. The court, after notice was provided, conducted a fairness hearing on January 15, 2015 to allow any class members who expressed the desire to address the court regarding the settlement to do so. (Dkt. No. 320.)

For the reasons explained below, the court grants the motion for final approval of the class action settlement, (Dkt. No. 260), because under the circumstances and the law the settlement reached in these three consolidated class action cases is fair, reasonable, and adequate. The court grants in part and denies in part Class Counsel's motion for approval of attorneys' fees, and grants Class Counsel's requested incentive awards to the five Named Plaintiffs in the amount of $5,000 each. (Dkt. No. 175.)

## BACKGROUND

### I. History of the Litigation

In 1991, Congress enacted the TCPA "to address telephone marketing calls and certain telemarketing practices that Congress found to be an invasion of consumer privacy." *Jamison* v. *First Credit Servs.*, 290 F.R.D. 92, 96 (N.D. Ill. 2013) (Kendall, J.). The "certain telemarketing practices" that drew Congress's legislative action were automatic telephone dialing systems and prerecorded voices. 47 U.S.C. § 227. The two technologies were relatively new in 1991 and greatly improved telemarketers' ability to contact consumers on their phones. In response to the "national outcry over the explosion of unsolicited telephone advertising," Congress passed the TCPA. *See* 137 Cong. Rec. 30,817 (1991) (statement of Senator Pressler). The TCPA prohibits callers from using "any automatic telephone dialing system or an artificial or prerecorded voice" to make any non-emergency call to a cell phone, unless they have the "prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A)(iii). The penalties Congress enacted to answer the

public outcry are harsh: the TCPA imposes on callers statutory damages of $500 per call, which can be trebled if the court finds the violation to have been willful or knowing. 47 U.S.C. § 227(b).

The calls at issue in these three consolidated class actions were made for the decidedly non-emergency purpose of debt collection. According to the Amended Master Complaint, between January 18, 2008 and June 20, 2014, Capitol One or one of its Participating Vendors (on behalf of Capital One) called class members' cell phones using an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt. (Am. Compl. ¶ 52.)

After Plaintiffs filed their Master Complaint on February 28, 2013, the parties engaged in six months of class-wide discovery "sufficient to engage in meaningful settlement discussions." (Dkt. No. 129 at 13.) On July 2, 2013, November 4, 2013, and January 29, 2014, the parties participated in mediation sessions with retired United States Magistrate Judge Edward A. Infante. The parties also spoke with Judge Infante by phone on two other occasions. (*Id.*) Capital One and Plaintiffs agreed thereafter to a settlement in February 2014. (*Id.* at 14.) The Participating Vendors agreed to join the settlement in the months thereafter. (*Id.*)

On June 13, 2014, Plaintiffs filed their request for an order certifying the proposed class for settlement purposes, preliminarily approving the settlement agreement, approving the notice plan, ordering the dissemination of notice as set out in the Settlement Agreement, and appointing BrownGreer as the Notice and Claims Administrator. (Dkt. No. 121.) Plaintiffs filed an amended motion seeking the same relief on July 13, 2014 and, on July 29, 2014, the court granted Plaintiffs' amended motion. (Dkt. No. 137.)

On August 12, 2014, BrownGreer began implementing the parties' notice plan, which entailed: (1) sending 12,342,000 summary notices via email to all potential class members who

had email addresses reflected in Capital One's records; (2) mailing 4,303,218 postcard notices via first class mail to class members who had opted out of receiving email from Capital One, who did not have email addresses on file, or whose emails were undeliverable; (3) running internet banner notices on 40 websites BrownGreer determined class members were likely to visit; (4) establishing a settlement website and toll-free information telephone number dedicated to answering telephone inquiries; and (5) providing notice of the settlement to the officials designated pursuant to Class Action Fairness Act, 28 U.S.C. § 1715. (Dkt. No. 264.)

BrownGreer provided a thorough summary of its execution of the notice plan in two separate declarations provided to the court. (Dkt. Nos. 264, 305.) Here, it is sufficient to note that the notice plan reached 15,983,613 known, unique settlement class members, a figure that represents 96.03% of the known settlement class and 91.22% of the estimated total settlement class.[3] (Dkt. No. 305 ¶ 6.) Despite the robust and effective notice plan, only 1,378,534 unique claimants—7.87% of the estimated class—filed claims with the administrator by the filing deadline. (*Id.* ¶ 14.) 462 class members have submitted valid opt-out requests and another 103 claimants have submitted opt-out requests that are invalid, either because they are incomplete or untimely. (*Id.* ¶ 8.) BrownGreer estimated that as of December 23, 2014 its total notice and administration costs were $5,093,000. (*Id.* ¶ 16.) No updated figures have been provided to the court.

[3] The parties estimate that approximately 5% of the settlement class is unknown to Capital One or Plaintiffs. (Dkt. No. 264 ¶ 11.)

## II. The Settlement Agreement

The important provisions of the Settlement Agreement provide for both monetary and injunctive relief to class members.

The Settlement Agreement defines the settlement class as follows:

> All persons within the United States who received a non-emergency telephone call from Capital One's dialer(s) to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from January 18, 2008 through June 20, 2014, and all persons within the United States who received a non-emergency telephone call from a Participating Vendor's dialer(s) made on behalf of Capital One to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from February 28, 2009, through June 20, 2014.

(Settlement Agreement § 2.39.) Plaintiffs estimate that the class includes 17,522,049 members.[4]

The Settlement Agreement requires Defendants to establish a non-reversionary settlement fund of $75,455,099.[5] (Settlement Agreement § 2.42.) After subtracting notice and administration costs ($5,093,000), Class Counsel's requested service awards for the five Named Plaintiffs ($25,000), and Class Counsel's requested fee award ($22,636,530)—all of which will be paid out of the settlement fund—the value of the settlement to class members is $47,700,569. (Dkt. No. 305.); s*ee Pearson* v. *NBTY, Inc.*, 772 F.3d 778, 780-81 (7th Cir. 2014) (citing *Redman* v. *RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014) (holding notice costs, administration costs, and attorneys' fees are not part of the value received from the settlement by class members). If all 17,522,049 class members had filed a claim, they would have received $2.72

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[4] The court calculated this figure using BrownGreer's number of contacted class members, 15,983,613, in conjunction with its assessment that 15,983,613 represents 91.22% of the total class. (*See* Dkt. No. 305 ¶ 6.)

[5] The settlement fund is actually $75,455,098.74. For the sake of simplicity, the court has rounded the numbers to the closest dollar, as it has done with the other figures discussed in this opinion.

each. But because only a fraction of class members filed a claim, as is often the case in consumer class actions, the 1,378,534 timely claimants will receive at least $34.60 each, and possibly more if some claimants fail to cash their settlement checks within 210 days, allowing for a second *pro rata* distribution to class members who filed a claim and deposited their settlement checks on time. (Settlement Agreement § 7.04(e).) If, following the second *pro rata* distribution, there remain undeposited settlement checks, the remainder of the settlement fund will go to a *cy pres* recipient. The Settlement Agreement does not identify the recipient of the *cy pres* award because the parties decided to wait until after the claims period to gauge the potential size of any *cy pres* award. (Settlement Agreement § 7.04(f).) In their response to objectors, however, Class Counsel agreed to name the Electronic Frontier Foundation. (Dkt. No. 269 at 33.)

The Settlement Agreement also requires Capital One to institute a protocol under which it uses an automatic dialer to call a customer's (or debtor's) cell phone number only in cases where the individual provided the cell phone number on his or her credit application. Capital One will further refrain from calling a cell phone number unless either the cell phone number is linked to the customer's name based on third party research or Capital One has made contact with the customer on the cell phone number within the past 90 days. (Dkt. No. 262 ¶ 21.) As discussed below, this change would bring Capital One's use of an automatic dialer within Plaintiffs' interpretation of the statutorily undefined term "prior express consent," which is excluded from the prohibitions of the TCPA, 47 U.S.C. §227(b)(1).

The court, at final approval hearing on January 15, 2015, (Dkt. No. 320), heard from Class Counsel, counsel for Capital One, and counsel for objector Jeffrey Collins. Although the court invited specific objectors by name and anyone else present in the courtroom to speak, no

other objector addressed the court even though some of the objectors had previously indicated their intent to address the court at the final approval hearing.[6]

## LEGAL STANDARDS

### I. Approval of a Proposed Settlement in Class Actions

A court may approve a settlement that would bind class members only if, after proper notice and a public a hearing, the court determines that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(3). Under Seventh Circuit law, a district court must, in evaluating the fairness of a settlement, consider "the strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement." *Synfuel Techs., Inc.* v. *DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (quoting *Isby* v. *Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996)).

"The 'most important factor relevant to the fairness of a class action settlement' is the first one listed: 'the strength of plaintiff's case on the merits balanced against the amount offered in the settlement.'" *Synfuel*, 463 F.3d at 653 (quoting *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir. 1979)). Furthermore, "[i]n conducting this analysis, the district court should begin by 'quantifying the net expected value of continued

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[6] The court originally set the final approval hearing for December 9, 2014, but rescheduled the hearing for January 15, 2015 after granting Collins' request for additional discovery. Class Counsel informed all objectors who had previously stated a desire to appear of the date change and, out an abundance of caution, the court's clerk waited in the courtroom designated for the hearing on December 9 to record the appearance of any objector who mistakenly appeared on that date. No objector came to the designated courtroom on December 9, 2014.

litigation to the class.' To do so, the court should 'estimate the range of possible outcomes and ascribe a probability to each point on the range.'" *Id.* (quoting *Reynolds* v. *Beneficial Nat'l Bank*, 288 F.3d 277, 284–85 (7th Cir. 2002)).

"Federal courts naturally favor the settlement of class action litigation." *Isby*, 75 F.3d at 1196. Nevertheless, the Seventh Circuit has warned that "the structure of class actions under Rule 23 . . . gives class action lawyers an incentive to negotiate settlements that enrich themselves but give scant reward to class members, while at the same time the burden of responding to class plaintiffs' discovery demands gives defendants an incentive to agree to early settlement that may treat the class action lawyers better than the class." *Thorogood* v. *Sears, Roebuck & Co.*, 627 F.3d 289, 293 (7th Cir. 2010) (emphasis omitted). District courts must therefore "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions." *Synfuel*, 463 F.3d at 652. This court has endeavored to do that.

## II. Attorneys' Fees in Class Actions

"In a certified class action, the court may award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). In determining a reasonable fee, the court "must balance the competing goals of fairly compensating attorneys for their services rendered on behalf of the class and of protecting the interests of the class members in the fund." *Skelton* v. *Gen. Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989). To determine the reasonableness of the sought-after fee in a common-fund case, "courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (*Synthroid I*). The probability of success at the outset of the litigation is relevant to this inquiry. *See Florin* v. *Nationsbank of Ga., N.A.*, 34 F.3d 560, 565 (7th Cir. 1994).

In *Synthroid*, the Seventh Circuit held that the "market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Synthroid I*, 264 F.3d at 721. The Seventh Circuit has further explained that "[t]he object in awarding a reasonable attorney's fee . . . is to give the lawyer what he would have gotten in the way of a fee in arm's length negotiation, had one been feasible." *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). *See also In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir. 2011) (recognizing that "[s]uch [an] estimation is inherently conjectural").

The Federal Rules of Civil Procedure allow the court, in a certified class action, to "award reasonable . . . nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Seventh Circuit has instructed that district courts must exercise their discretion to "disallow particular expenses that are unreasonable whether because excessive in amount or because they should not have been incurred at all." *Zabkowicz* v. *W. Bend Co., Div. of Dart Indus., Inc.*, 789 F.2d 540, 553 (7th Cir. 1986) (quoting *Henry* v. *Webermeier*, 738 F.2d 188, 192 (7th Cir. 1984)).

## ANALYSIS

### I. Approval of the Class Settlement in This Litigation

Applying the five factors identified in *Synfuel*, the court concludes that the settlement is "fair, reasonable, and adequate," and therefore meets the requirements of Rule 23.

#### A. Potential of Class Members' Recovery through Continued Litigation Balanced Against Settlement Amount Offered

As noted above, "[t]he most important factor" in determining whether a proposed settlement satisfies Rule 23 is the "strength of [Plaintiffs'] case on the merits balanced against the amount offered in the settlement." *Synfuel*, 463 F.2d at 653 (citations omitted). The Settlement Agreement, as it stands, requires Defendants to pay $75.5 million into the settlement

fund out of which all eligible class members who made a timely claim will receive their *pro rata* share, and maybe more if fellow claimants are delinquent in depositing their checks. At the time the court granted preliminary approval, Defendants stated that the settlement constituted the largest cash sum in the 22-year history of the TCPA, (Dkt. No. 129 at 7). That fact, though true, is slightly deceiving because the size of the settlement amount is attributable mainly to the large size of the class—17.5 million people. The recovery per class member—excluding administrative costs, Named Plaintiff awards, and attorneys' fees—is a relatively diminutive $2.72. The court does not have the necessary data to compare this proposed settlement to other TCPA actions based on the recovery per *class member*. There are, however, a number of benchmark settlements to which the court can compare the recovery *per claimant*. The recovery per claimant here is $34.60. That number falls within the range of recoveries in other TCPA actions but, as Judge Davila noted in discussing a similarly sized settlement last year, it falls on the "lower end of the scale." *Rose* v. *Bank of Am. Corp.*, Nos. 11 C 2390 & 12 C 4009, 2014 WL 4273358, at *11 (N.D. Cal. Aug. 29, 2014). The settlement also falls far short of the $500 statutory recovery available for each phone call, of which there were many: Capital One or its Participating Vendors made approximately 1.9 billion phone calls in alleged violation of the TCPA. (Dkt. No. 324 at 11:3.) So if Plaintiffs were to litigate their claims successfully through trial, Capital One would be on the hook for a minimum of $950 billion. Moreover, Plaintiffs' recovery could possibly be as high as $2.85 trillion if Plaintiffs proved the violations were knowing or willful.

But a settlement is a compromise, and courts need not—and indeed should not—"reject a settlement solely because it does not provide a complete victory to plaintiffs." *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (St. Eve, J.). This is especially true when complete victory would most surely bankrupt the prospective

judgment debtor. It also bears mention that the $34.60 per claimant recovery in this case does not seem so miniscule in light of the fact that class members did not suffer any actual damages beyond a few unpleasant phone calls, which they received ostensibly because they did not pay their credit card bills on time.

More importantly, $34.60 per claimant is not insignificant considering Capital One's counsel's estimate that Plaintiffs will recover nothing through continued litigation. (Dkt. No. 267.) The court recognizes that Plaintiffs would indeed face myriad hurdles by proceeding to trial.

First, at a trial, Plaintiffs would have the burden to effectively rebut Capital One's chief defense that the class members' consented to be contacted on their cell phones. Capital One argues that it obtained consent to call from each class member because every version of Capital One's standard cardholder agreement contained provisions expressing that Plaintiffs consented to receive calls through an autodialing technology. (Dkt. No. 267 at 2.) Plaintiffs admit that they agreed to the terms of their cardholder agreements, but argue they did not agree to be contacted "in violation of the TCPA." (Dkt. No. 262.) Many class members, however, even provided their cell phone numbers to Capital One as their primary contact numbers. (*Id.*) Under an FCC order in 2008 implementing the TCPA, autodialed collection calls to "wireless numbers provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party," and are therefore permissible. *In Re Rules and Regulations Implementing the Telephone Consumer Prot. Act of 1991*, 23 F.C.C.R. 559 ¶ 9 (2008) ("2008 TCPA Order"); 47 U.S.C. § 227(b)(1)(A)(iii). The FCC's same 2008 TCPA Order, however, states that "prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed." 2008 TPCA Order ¶ 10. Plaintiffs interpret the FCC's 2008 TCPA Order to

mean that the cell phone number must have been provided during the origination of the credit relationship, *i.e.*, during the transaction. (Dkt. No. 262 at 21.) As United States District Judge J.P. Stadtmueller commented in a recent opinion, however, the 2008 TCPA Order is "far from clear." *Balschmiter* v. *TD Auto Finance LLC*, 2014 WL 6611008, at *8 (E.D. Wis. Nov. 20, 2014). Furthermore, in this district, the only district judge to have addressed the issue held that a caller is entitled to summary judgment against a TCPA claim when it can show the plaintiff provided a cell phone number as a contact number. *See Greene* v. *DirecTV*, No. 10 C 117, 2010 WL 4628734, at *3 (N.D. Ill. Nov. 8, 2010) (Kocoras, J.). The parties' disparate interpretations of the 2008 TCPA Order are reflective of the split opinion among practitioners and the courts, a split that at least injects uncertainty into this litigation and will continue to warrant caution by plaintiffs and defendants until clearer guidance is provided. *See, e.g.*, *Baird* v. *Sabre, Inc.*, 995 F. Supp. 2d 110, 1006 (C.D. Cal. 2014) (noting the FCC's series of TCPA Orders are not "model[s] of clarity").

Second, should Plaintiffs proceed to trial, there would be manageability concerns that may pose serious obstacles to class certification, thus depriving Plaintiffs of the benefits of a class action. Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In assessing predominance, a court must analyze "the likely difficulties in managing a class action," *id.* 23(b)(3)(D), which "encompass[ ] the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974). Identifying consenting class members and the precise timing and nature of that consent would require Capital One to locate documents and analyze call recordings for nearly all of the 17.5 million class members. These individual

determinations do not always comport with Rule 23(b)(3)'s manageability requirement and have caused some courts to reject class certification on numerous occasions. *See, e.g., Balschmiter*, 2014 WL 6611008, at *19-20; *see also Jamison*, 290 F.R.D. at 107 (denying certification of TCPA litigation where "parties would need to scour [defendant's] records" to determine consent).

Third, without the prompt and final resolution a settlement provides, Plaintiffs run the risk that forthcoming FCC orders may extinguish their claims. There are three sets of petitions currently before the FCC, all of which would eliminate or reduce Capital One's TCPA liability in this case. The first is the FCC's definition of an autodialer. Although the TCPA defines an autodialer as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers," 47 U.S.C. § 227(a)(1), the FCC has expanded the definition to cover predictive dialers that can "store or produce telephone numbers," even if they do not "us[e] a random or sequential number generator." *See In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14014, 14091-93 (2003). The FCC is considering petitions seeking to exclude from the TCPA predictive dialers used for non-telemarketing purposes, such as debt collection. (*See* Dkt. No. 267 (collecting petitions).) The second and, perhaps, more pressing set of petitions to the FCC ask the FCC to clarify how and when consent may be expressed by consumers. *See* Michael O'Rielly, FCC Commissioner, *TCPA: It is Time to Provide Clarity*, FCC Blog (Mar. 25, 2014) (*available at* http://www.fcc.gov/blog/tcpa-it-time-provide-clarity) (asserting that "the FCC needs to address this inventory of petitions as soon as possible," and "answer . . . whether consent can be inferred from consumer behavior or social norms"). The final set of petitions seeks to clarify that a caller does not violate the TCPA when it makes autodialed calls to another cell phone subscriber by mistake. (*See* Dkt. No. 267 (collecting petitions).) If the FCC were to

issue orders favoring callers in connection with any of the issues discussed above, Plaintiffs claims would be completely barred or materially limited.

In light of Capital One's potentially meritorious defenses and the legal uncertainty concerning the application of the TCPA, the court concludes that Plaintiffs would probably face an uphill battle proceeding to trial and, once there, obtaining relief. The settlement provides value that is fair considering the very real possibility that Plaintiffs may recover nothing if they were to proceed further with the litigation.

**B. Likely Complexity, Length and Expense of Litigation**

In *Synfuel*, the Seventh Circuit instructed that the likely complexity, length, and expense of continued litigation are relevant factors district court should consider in determining whether a class action settlement satisfies Rule 23. *Synfuel*, 463 F.3d at 653. All of these factors when considered in this litigation strongly weigh in favor of approval of the proposed settlement. Although the parties have conducted limited discovery for the purpose of evaluating settlement, they would need to engage in significant additional discovery of Capital One's millions (or billions) of call records, if the litigation were to proceed further. This would likely require each side to retain experts to analyze the mountains of data. There would be significant motion practice, and any judgment in favor of Plaintiffs would be further delayed by any appeal taken from the entry of a final judgment.

**C. Scant Opposition to Settlement**

The Seventh Circuit has held that the amount of opposition to a settlement among affected parties is yet another factor district courts should consider in deciding whether to approve a class action settlement. *Synfuel*, 463 F.3d at 653. Only 565 class members have requested to be excluded from the settlement, representing approximately 0.0032% of all class

members.[7] Of the approximately, 17.5 million class members, the court has received 14 timely objections to the Settlement Agreement and only 9 of those objections take issue with the value of the settlement; the other 5 objectors limit their concerns to Class Counsel's requested fee award. Such a low percentage of opposition favors a finding that the settlement is fair, reasonable, and adequate under Rule 23. *See, e.g.*, *AT&T Mobility*, 789 F. Supp. 2d at 965 (citations omitted) (finding opt-out or objection by 0.01% of class members was "remarkably low" and supported the settlement).

**D. The Experience and Views of Counsel**

Under *Synfuel*, the opinion of competent counsel is relevant to determining whether a class action settlement is fair, reasonable, and adequate under Rule 23. *Synfuel*, 463 F.3d at 653. The court accepts that Class Counsel in this case are experienced litigators, especially in the TCPA context, and that they strongly support the settlement. (Dkt. No. 262 at 20.) Even though Class Counsel may be considered biased because they stand to benefit from approval, under *Synfuel*, this factor weighs in favor of approval.

**E. Stage of the Proceedings and the Amount of Discovery Completed**

The final factor the court is to consider under *Synfuel* concerns the stage of the proceedings and the amount of discovery completed at the time of the settlement. *Synfuel*, 463 F.3d at 653. The parties in this case engaged in substantial motion practice and discovery in two of the individual class actions before the JPML transferred the cases to this court. Class Counsel have analyzed a complete set of the contractual language Capital One offers as the basis for class members' consent to be contacted. And prior to the mediation proceedings before retired Magistrate Judge Infante, the parties exchanged discovery over a six-month period sufficient to

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[7] The court includes invalid and untimely opt-out requests in the total because those requests, although invalid, signal disapproval of the settlement.

engage in "meaningful settlement discussions." Although this settlement-directed discovery is not identical to the type of full discovery that counsel may desire "to evaluate the merits of plaintiffs' claims," *Armstrong* v. *Bd. Of Sch.. Dirs. of City of Milwaukee*, 616 F.2d 305, 325 (7th Cir. 1980), the court is not convinced that extensive formal discovery, when measured against the cost that would be incurred, would place the parties in a proportionally better position than they are now to determine an appropriate settlement value of this litigation. Evaluating the merits of Plaintiffs' claims would, as discussed above, require an arduous scouring of Capital One's records for individual plaintiffs, undermining the cost-saving benefits of the settlement. The court finds that the parties have completed a sufficient amount of discovery to be able to place value on their respective positions in this case. The final *Synfuel* factor weighs in favor of settlement.

**F. Objections Presented Are Not Well Founded Under the Applicable Law**

For the reasons explained above, the factors set out by the Seventh Circuit in *Synfuel* support approving the Settlement Agreement in this case. Notwithstanding the court's conclusion that the Settlement Agreement is fair, reasonable, and adequate under Rule 23, there are 14 class members who have filed timely objections, although only a subset of those 14 take issue with the amount of the settlement. (Dkt. Nos. 144, 152, 184, 189, 193, 196, 199, 202, 215, 225, 227, 228.) These objections collectively state a number of arguments the court will discuss briefly below.

First, some objectors argue that class members are not receiving enough money in light of the available statutory damages. As the court discussed above, a class-wide recovery in line with the statutory awards is unrealistic and would ultimately result in class members finding their place in line among Capital One's unsecured creditors in a bankruptcy proceeding. Moreover, as discussed above, the strength of Plaintiffs' case did not warrant a settlement anywhere close to

the statutory award, which is what Plaintiffs would have sought had they prevailed at trial on the liability issue.

Second, certain objectors complain that they should be able to make claims against the settlement fund for every call they received, consistent with the framework of the TCPA. Although the court inquired of counsel about the possibility of a call-based claims process as well, the court ultimately accepts the representations of Class Counsel and Capital One that it is unlikely that a material portion of the class had an average call volume greater or lesser than any other class member. The court also accepts Class Counsel's representation that a call-based claims process would be extremely costly to administer and is inadvisable given the fact that increased administration costs would result in a corresponding decrease in the money available to the class.

Lastly, the court rejects the complaints of the objectors who have any issue with the notice and claims process. The court agrees with Class Counsel that the notice provided by BrownGreer was state of the art and well-tailored to reach the maximum number of class members. Lead counsel for Capitol One represented to the court that percentage of class members reached through the notice process was the highest he had ever seen. (Dkt. No. 324 at 35:16-20.) Submitting a claim, in this court's experienced view, was exceedingly easy for the class members. Each class members needed only to complete a short online form or return a postcard.

Accordingly, the court finds that none of the objections to the total amount of the settlement or its administration are well-founded and, for the reasons explained in detail above, the court grants the motion (Dkt. No. 260) for final approval of the class action Settlement Agreement.

## II. Attorneys' Fees

Although certain of 14 timely objectors contend that Class Counsel's requested fee is excessive, the court need not engage in a lengthy analysis of each objector's argument because the Seventh Circuit has directed district courts, when deciding whether requested fees are excessive, to estimate the contingent fee that the class would have negotiated with Class Counsel at the outset of the litigation, "had negotiations with clients having a real stake been feasible." *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir. 2011). The court endeavors to approximate such a market fee below.

### A. Class Counsel's Requested Fees

Class Counsel in this case represent that they have spent 4,268 hours in professional time over a three-year period litigating and settling this case on a contingent fee basis. (Dkt. No. 252.) They seek for their efforts an award of attorneys' fees equal to 30% of the $75,455,099 settlement fund or $22,636.530. They do not seek additional payment or reimbursement for any of their expenses on top of the requested fee award, nor do they seek compensation for the injunctive relief barring Capital One from calling an individual's cell phone without prior express consent.

To justify their request, Class Counsel argue that their requested fee is less than the 33.3% fee "consistently" awarded in TCPA and non-TCPA class action litigation in this district. (*See* Dkt. No. 176 at 19-20 (collecting cases).) They further argue that the substantial risk they assumed in prosecuting the litigation on a purely contingent basis supports a 30% fee because there is a reasonable chance that this case, if litigated, could result in no recovery at all for the class. Class Counsel urge the court to adopt their preferred approach to calculating fees based on a percentage of the settlement fund rather than through a lodestar analysis, and to calculate that

percentage from the total settlement fund inclusive of administrative costs, *cy pres* awards, and incentive awards.

**B. Fee Calculation Method**

Although the court granted limited discovery regarding Class Counsel's lodestar data, the court agrees with Class Counsel that the fee award in this case should be calculated as a percentage of the money recovered for the class. It has long been the law in the Seventh Circuit that in common fund cases like this one, district courts have discretion to choose either the lodestar or a percentage approach to calculating fees. *Florin* v. *Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994) ("It bears reiterating here that we do not believe that the lodestar approach is so flawed that it should be abandoned . . . . We therefore restate the law of this circuit that in common fund cases, the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court. We recognize here . . . that there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration."). Ultimately, the district judge's job is to approximate the market rate between willing buyers and willing sellers that would have prevailed had the parties negotiated the rate at the outset of the representation. *Silverman* v. *Motorola Solutions, Inc.*, 739 F.3d 956, 957 (7th Cir. 2013) (citations omitted). Although the court need not adopt the calculation method that is most prevalent in the marketplace as it existed at the time of the hypothetical negotiation, *see Cook* v. *Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1994), such an approach is more efficient for the court and more likely to yield an accurate approximation of the market rate.

Here, had an arm's length negotiation been feasible, the court believes that the class would have negotiated a fee arrangement based on a percentage of the recovery, consistent with the normal practice in consumer class actions. An *ex ante* agreement based on lodestar requires a

client to monitor counsel, and the class-member "clients" here had little incentive to do so. There are approximately 17.5 million class members in this case, the prospective relief is minimal, and none of the class members suffered tangible damages beyond the inconvenience of receiving one or more debt-collection calls to their cell phones on ostensibly overdue credit card bills. The class would not have negotiated a compensation scheme that required a level of monitoring the class members were not interested in or capable of providing. Instead, the class would have chosen the compensation scheme that required the least monitoring to align the incentives of the class and its counsel—the percentage method. The court will therefore apply the percentage method as well.

The court does not, however, agree with Class Counsel's assertion that "it is appropriate—and the norm in the Seventh Circuit—to include administrative and notice costs when calculating fees based on a percentage-of-the-fund." (Dkt. No. 269 at 17.) The Seventh Circuit has instructed district courts that the "ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman* v. *RadioShack*, 768 F.3d 622, 630 (7th Cir. 2014). Administration and notice costs, although paid through the settlement fund, are not benefits to the class and thus not part of "what the class members received." *Id.* Class Counsel argue that the Seventh Circuit's recent instruction in *Redman* applies only in cases involving a fund that must be monetized from coupon redemptions. The settlement in this case, by contrast, is a non-reversionary cash fund. (Dkt. No. 269 at 18.) The court does not agree with Class Counsel's limited interpretation of *Redman*. In *Pearson* v. *NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), decided two months after *Redman*, the Seventh Circuit applied its holding in *Redman* to a reversionary cash fund and clarified that costs incurred as part of the settlement do not shed light on the fairness of the split between Class Counsel and class members. *Id.* at 781 (citing *Redman*,

768 F.3d at 630). The Seventh Circuit also extended its analysis to *cy pres* and service awards because neither award directly benefits the class, or at least the whole class, and therefore should not be included in the court's assessment of the settlement's value to the class. *Id.* at 784.

In order to evaluate the fairness of Class Counsel's fee request consistent with the Seventh's Circuit's recent guidance, the court must recalculate the percentage fee sought by Class Counsel. After subtracting administration and notice costs ($5,093,000) and the Named Plaintiff service awards ($25,000), the total money available to split among the class and Class Counsel is $70,337,099. Class Counsel seeks 22,636,530 of that total, or slightly above 32%.

**C. Class Counsel's Requested 32% Fee Exceeds the Market Rate**

The Seventh Circuit has instructed district courts to approximate the market rate that would have prevailed at the outset of the litigation had negotiations between Class Counsel and "clients having a real stake" been feasible. *Trans Union Corp. Privacy Litig.*, 629 F.3d at 744. The Seventh Circuit, however, has not expressed a preference for a particular method of determining that market fee. The market-mimicking approach is, as the Seventh Circuit acknowledged, "inherently conjectural." *Id.*; *see also Synthroid I*, 264 F.3d at 719 ("[I]t is indeed impossible to know *ex post* the outcome of a hypothetical bargain *ex ante*.") In *Synthroid I*, however, the Seventh Circuit explained that it is possible to learn about "similar bargains" and set forth three "guides" or "benchmarks" to help district courts estimate the market fee: (1) actual fee contracts between plaintiffs and their attorneys; (2) data from similar common fund cases where fees were privately negotiated; and (3) information from class-counsel auctions. *Synthroid I*, 264 F.3d at 719. At least two judges presiding in this district, and one judge from another district employing the Seventh Circuit's market-mimicking approach, have applied these three benchmarks to determine *ex post* the market contingent fee. *See AT&T Mobility*, 792 F. Supp. 2d at 1033-1034; *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at

*10-13 (N.D. Ill. Dec. 9, 2009) (Gettleman, J.), *rev'd on other grounds*, 629 F.3d 741 (7th Cir. 2011); *In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 40-45 (D.N.H. 2006) (Smith, J.). This court will likewise analyze each benchmark to estimate the prevailing market rate for TCPA class action litigation generally, and then adjust that rate based on the risk of nonpayment in this case.

**1. Class Counsel's Contingent Fee Agreements**

The first benchmark is any actual agreement between plaintiffs and attorneys in this case. This was a useful starting point in *Synthroid* because one group of sophisticated plaintiffs had negotiated a fee agreement at the outset and set the opening price. *Synthroid I*, 264 F.3d at 720. That, however, is not the case here. Like most consumer class actions, the only fee agreements are Class Counsel's retainer agreements with the Named Plaintiffs, which provide for contingent fees ranging from 33.3% to 40% of the settlement fund. (Dkt. No. 176 at 22.) These retainer agreements are of little value to determining the market rate because named plaintiffs are less often sophisticated buyers of legal services and more often "the cat's paws of the class lawyers." *In re Trans Union*, 629 F.3d at 744. Moreover, the agreements here were between Class Counsel and five individual plaintiffs who, individually, did not have "a sufficient stake to drive a hard—or any—bargain with the lawyer[s]." *Continental*, 962 F.2d at 572. The court therefore finds that Class Counsel's contingent fee agreements with the Named Plaintiffs do not inform the court's estimation sufficiently as to what Class Counsel would have received in an *ex ante* negotiation with the entire class, has such a negotiation occurred.

**2. Data on Fee Awards in Other Cases**

The second and third *Synthroid* benchmarks concern data from similar common fund cases where the parties set fee schedules *ex ante*, either through a private negotiation or a judicially conducted "auction." Because data from pre-suit negotiations and auctions tend to be

sparse—and with regard to TCPA class actions, nonexistent—district courts have also examined empirical data analyzing fee awards in other class actions where fees were awarded at the end of the case. *See, e.g.*, *AT&T Mobility*, 792 F. Supp. 2d at 1033; *Trans Union*, 2009 WL 4799954, at *11-13. The Seventh Circuit has relied on the same empirical data to determine the "norm" for fee awards, *see Silverman,* 739 F.3d at 958, and this court will do so as well. While large-scale empirical studies necessarily include *ex post* fee awards from other circuits that may not be reflective of the market price at the time those cases were filed, the awards likely affect the price at which national class action lawyers are willing to provide their services going forward. *See, e.g.*, *Trans Union*, 2009 WL 4799954, at *11 (noting awards in class actions generally may influence expectations of a lawyer and client engaging in negotiation); *Nilsen* v. *York County*, 400 F. Supp. 2d 266, 282-83 (D. Me. 2005) ("Other courts' awards necessarily affect the expectations of lawyers and, therefore, what they might agree to in voluntary negotiation.")

**i. Empirical Studies**

In 2004, Theodore Eisenberg and Geoffrey Miller examined two data sets covering class actions from 1993 to 2002 and found that the mean fee award from settlements in the $38 to $79 million range was 16.9% and the median was 15.5%. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Studies 27, 73 (2004). In 2010, Eisenberg and Miller updated their study in to analyze class action settlements from 1993 to 2008. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Studies 248 (2010). The updated study found that the mean award from settlements in the $38.3 to $69.6 million range, the third highest decile, was 20.5% and the median was 21.9%; the mean award from settlements in the $69.6 to $175.5 range, the second highest decile, was 19.4% and the median was 19.9%. *Id.* at Tab. 7.

In the same year as Eisenberg and Miller published their updated 2010 study, Brian Fitzpatrick, who filed a declaration in this case on behalf of Class Counsel, (Dkt. No. 270), published a paper analyzing every federal class action settlement in 2006 and 2007. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Studies 811 (2010). Fitzpatrick found that the mean award from settlements in the $72.5 to $100 million range was 23.7% and the median was 24.3%. *Id.* at 839.

All three studies confirm Eisenberg and Miller's original finding of a scaling effect whereby the percentage fee decreases as the class recovery increases. *See* 1 J. Empirical Legal Stud. At 28 ("[A] scaling effect exists, with fees constituting a lower percent of the client's recovery as the client's recovery increases.") In Eisenberg and Miller's 2010 study, they found that settlements in the top decile by total recovery yielded a median and mean fee percentage that was less than one-third of the median and mean percentage fee in settlements in the lowest decile. 7 J. Empirical Legal Studies at 264. Fitzpatrick found a similar, although less pronounced scaling effect: settlements in the top decile by recovery yielded a mean fee of 18.4% and a median of 19%, whereas settlements in the lowest decile yielded a mean fee of 28.8% and a median of 29.6%. 7 J. Empirical Legal Studies at 839; *see also Silverman*, 739 F.3d at 958 (observing that the empirical data show that the percentage of the fund awarded to counsel declines as the size of the fund increases).

Accordingly, if past awards are reflective of the market for this case and its $75.5 million negotiated settlement fund, and if the published empirical data discussed above accurately reflect the fees awarded in TCPA class actions, it is fair to conclude that class members would have negotiated an across-the-board fee somewhere between 20% and 24% of the settlement fund. Class Counsel's requested 32% fee (or 30% fee, depending on the denominator) exceeds that across-the-board range.

### ii. The Court's TCPA Class Action Settlement Analysis

To assist the court in determining whether the findings from the above empirical studies are indeed representative of the across-the-board percentage fees awarded in TCPA class actions, the court requested class counsel in another settled TCPA case, *Wilkins* v. *HSBC Bank*, No. 14 C 190 (N.D. Ill.), pending on this court's docket, to submit data from other finally approved TCPA class action settlements since 2010. Class counsel in *HSBC*, many of whom also represent class members in this case, diligently compiled publicly available summary information contained in 73 TCPA class action settlements approved since 2010. *See HSBC*, No. 14 C 190 (N.D. Ill.) (Dkt. No. 109-1). The court has now analyzed the data from 72 of the cases—one case lacked publicly available fee information—and has attempted in the table below to recreate the Eisenberg-Miller and Fitzpatrick summaries for TCPA class action settlements. Like the empirical analyses discussed in the previous section, the table below reports the mean and median fee percentage, as well as the standard deviation, for each total recovery decile of the TCPA class action settlements provided by class counsel in *HSBC*.

| Decile Recovery Range (Start/End)[8] | Mean Fee (%) | Median Fee (%) | Standard Deviation | Number of Cases |
|---|---|---|---|---|
| Less than $345,000 | 31.2 | 31.5 | 3.1 | 8 |
| $345,000 $510,000 | 33.1 | 33.3 | 2.8 | 7 |

[8] In cases where any unclaimed portion of the settlement reverted to defendants, the court considered the total recovery to be the amount made available to class members before any reversion.

| Decile Recovery Range (Start/End)[8] | Mean Fee (%) | Median Fee (%) | Standard Deviation | Number of Cases |
|---|---|---|---|---|
| $510,000 $1.1 Million | 37.1 | 33.0 | 18.1 | 7 |
| $1.1 million $1.6 million | 29.4 | 33.3 | 6.3 | 7 |
| $1.6 million $2.6 million | 30.7 | 30.7 | 4.1 | 7 |
| $2.6 million $4.6 million | 26.1 | 33.0 | 10.2 | 7 |
| $4.6 million $7.0 million | 24.1 | 25.0 | 9.8 | 7 |
| $7.0 million $9.8 million | 25.8 | 25.0 | 4.6 | 7 |
| $9.8 million $15.9 million | 23.7 | 25.0 | 8.6 | 7 |
| $15.9 million $39.9 million | 17.2 | 17.7 | 4.8 | 8 |

*HSBC*, No. 14 C 190 (N.D. Ill.) (Dkt. No. 109-1).

Because this court lacks the technical expertise of Eisenberg, Miller, or Fitzpatrick, and because the sample size of cases (72) is quite small, the statistics set forth above are but an

informal analysis.[9] The data similarly fail to provide a meaningful benchmark for a case like this one, where the $75.5 million recovery begins to approach what many courts consider a "megafund." Despite these shortcomings, the available TCPA data offer two important insights. First, the across-the-board percentage awards in TCPA class actions roughly track the fee awards in other types of cases, after controlling for class recovery amount. Second, TCPA class actions exhibit the same relationship between fee awards and recoveries as other types of cases: that is, the percentage of the fund awarded to counsel generally declines as the size of the fund increases.

### iii. Competitive Fee Structures Negotiated Ex Ante

The analysis desired by Seventh Circuit authority is not at an end, however, because the second and third benchmarks from *Synthroid*—*ex ante* arrangements and judicially overseen "auctions"[10]—reveal that sophisticated parties engaged in an pre-filing fee negotiations rarely agree to a single, across-the-board percentage fee structure, and rarely pay a percentage of the recovery equal to the benchmark established by past awards. The court has not uncovered any data about *ex ante* fee arrangements or auctions in the consumer class action context, let alone data on TCPA class actions. Data from published opinions in securities and antitrust cases do exist where district courts utilized a competitive approach to negotiate a fee structure on behalf

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[9] The court has expended considerable time and effort placing the information submitted by *HSBC* counsel into usable a dataset for this informal analysis. To assist judges in future cases, and to provide a starting point for more adept statisticians, the court will make its underlying dataset available in a separate order on the docket.

[10] The Seventh Circuit has repeatedly stated that litigants do not select their own lawyers through auctions because there is no standard of quality of legal services. *Silverman*, 739 F.3d at 958; *In re Synthroid Marketing Litig.*, 325 F.3d 974, 979-80 (7th Cir. 2003) (*Synthroid II*). To the extent that the term "auction" implies an iterative process where bidders compete exclusively on price, that is not the process described here. The auctions described in this section reflect cases where judges placed themselves in the "clients'" shoes and selected the "best bid" based on the quality of the legal work and the price offered. *See Synthroid I,* 264 F.3d at 720.

of the class at the outset. As far as the court can tell, there are at least fourteen class action cases—twelve securities actions and two antitrust actions—where district court judges have selected lead counsel and negotiated a fee structure using a competitive process. *See In re Oracle Sec. Litig.*, 131 F.R.D. 688 (N.D. Cal. 1990); *In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467 (N.D. Cal. 1994); *In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp. 1190 (N.D. Ill. 1996) (Shadur, J.); *In re California Micro Devices Sec. Litig.*, 168 F.R.D. 257 (N.D. Cal. 1996); *In re Cendant Corp. Litig.*, 182 F.R.D. 144 (D.N.J. 1998); *In re Network Assocs. Inc., Sec. Litig.*, 76 F. Supp. 2d 1017 (N.D. Cal. 1999); *Sherleigh Assocs. LLC* v. *Windmere-Durable Holdings, Inc.*, 184 F.R.D. 688 (S.D. Fla. 1999); *In re Lucent Techs. Inc. Sec. Litig.*, 194 F.R.D. 137 (D.N.J. 2000); *In re Bank One Shareholders Class Actions*, 96 F. Supp. 2d 780 (N.D. Ill. 2000) (Shadur, J.); *Wenderhold* v. *Cylink Corp.*, 188 F.R.D. 577 (N.D. Cal. 1999); *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2001); *In re Quintus Sec. Litig.*, Nos. 00-C-4264 & 00-C-3894, 2001 WL 709204 (N.D. Cal. Apr. 12, 2001); *In re Commtouch Software Ltd. Sec. Litig.*, No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection (N.D. Cal. June 27, 2001); *In re Comdisco Sec. Litig.*, 141 F. Supp. 2d 951 (N.D. Ill. 2001) (Shadur, J.) (Memorandum Opinion entering attached Apr. 6, 2001, Memorandum Order).

The data from these securities and antitrust cases, where available, do not shed light on the market rate in consumer class actions, but they do illustrate that (1) negotiated fee agreements regularly provide for a recovery that increases at a decreasing rate and (2) negotiated fee agreements frequently result in lower fee awards than those suggested by the empirical data on past awards granted after the fact. In 2006, United States District Judge William Smith conducted a survey of the fee structures adopted in some of the cases listed above. *Cabletron*, 239 F.R.D. at 43. The findings of Judge Smith's survey are reprinted in part below and supplemented by this court's independent research. Because the case before Judge Smith was a

securities class action, Judge Smith applied the negotiated fee schedule of each surveyed case to the settlement amount in *Cabletron*. This court will not conduct a similar analysis because, as discussed above, the court cannot impute the market rate for attorneys' fees charged in securities and antitrust cases onto a consumer class action. It is sufficient to note that in nearly every case, the presiding judge selected a bid with a declining contingent-fee scale.[11] *See Cabletron*, 239 F.R.D at 44 ("[T]he competitive fee structures uniformly reflect a downward scaling as the settlement fund increases.").

Instead, the court compares the prevailing fee percentage (*i.e.*, the "blended" rate) in each case to the mean and median set forth in Eisenberg and Miller's 2010 study for the corresponding recovery amount. Such a comparison should help the court determine whether and to what extent the empirical data—which largely reflect past fee awards determined *ex post*—overestimate the contingent fees parties agree to when they actually negotiate at the outset of a case.

The summary is as follows:

| Case Name | Total Recovery | Actual Fee Award[12] | Eisenberg & Miller Mean/Median |
|---|---|---|---|
| *In re* Oracle Sec. Litig., No. 90-CV-931 (N.D. Cal., Judge Vaughn Walker) | $25 million | 22.5% | 22.1% (mean)<br>24.9% (median) |

[11] In *In re Auction Houses Antitrust Litigation*, 197 F.R.D. 71 (S.D.N.Y. 2000), counsel agreed to the opposite approach, taking no fees for the first $405 million recovered and 25% of everything above $405 million. The government had already established liability and the lawyers (as well as the class and the court) believed that the first few hundred million would come easy. *See Synthroid I*, 264 F.3d at 721 (discussing fee structure selected in *Auction Houses*).

[12] Unlike Judge Smith's analysis, and in recognition that Class Counsel in this case have not included a request for expenses on top of their overall fee request, the court includes expenses awarded to Class Counsel in calculating the fee award.

| Case Name | Total Recovery | Actual Fee Award[12] | Eisenberg & Miller Mean/Median |
|---|---|---|---|
| *In re* Wells Fargo Sec. Litig., No. 91-CV-1944 (N.D. Cal., Judge Vaughn Walker) | $13.7 million | 22% | 23.8% (mean)<br>25.0% (median) |
| *In re* California Micro Devices Sec. Litig., No. 94-CV-2817 (N.D. Cal., Judge Vaughn Walker) | $26 million | 15.7% | 22.1% (mean)<br>24.9% (median) |
| In re Amino Acid Lysine Antitrust Litig., No. 95-CV- 7679 (N.D. Ill., Judge Milton Shadur) | $49 million | 7.0% | 20.5% (mean)<br>21.9% (median) |
| In re Cendant Corp. PRIDES Litig., No. 98- CV-2819 (D.N.J., Judge William H. Walls) | $341 million | 6.0% | 12.0% (mean)<br>10.2% (median) |
| In re Cendant Corp. Non-PRIDES Litig., No. 98-CV-2819 (D.N.J., Judge William H. Walls) | $3.2 billion | 8.7% | 12.0% (mean)<br>10.2% (median) |
| In re Auction Houses Antitrust Litig., No. 00-CV-648 (S.D.N.Y., Judge Lewis Kaplan) | $512 million | 5.2% | 12.0% (mean)<br>10.2% (median) |
| In re Bank One Shareholders Class Actions, No. 00-CV-880 (N.D. Ill., Judge Milton Shadur) | $45 million | 7.0% | 20.5% (mean)<br>21.9% (median) |
| In re Network Associates, Inc., No. 99-CV-1729 (N.D. Cal., Judge William Alsup) | $30 million | 8.0% | 22.1% (mean)<br>24.9% (median) |
| In re Quintus Corp. Sec. Litig., No. 00-CV-4263 (N.D. Cal., Judge Vaughn Walker) | $10 million | 11.3% | 22.8% (mean)<br>22.1% (median) |

*Cabletron*, 238 F.R.D. at 44; Laural L. Hooper & Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, Washington, D.C.: Federal Judicial Center, 2001 (supplementing Judge Smith's analysis).

As discussed earlier, the foregoing analysis is merely illustrative and does not purport to approximate the contingent fee for a TCPA class action, had that fee been negotiated at the outset of the case with a "client" having a real stake in the outcome. The analysis does, however, suggest that selecting competent counsel using a competitive process generates a lower percentage-of-the-fund fee arrangement than Eisenberg and Miller's mean and median percentages, which mostly reflect awards granted *ex post*. The spreads between the negotiated fees and Eisenberg and Miller's estimates vary from 0% to 17% and are especially pronounced for settlements that produced large recoveries. The particular spread depends on the unique facts and risk factors of each case, but the court's finding here is generally consistent with the experience of district court judges who have used a competitive-bid approach to select counsel in the past. *See, e.g.*, *In re Comdisco Sec. Litig.*, 150 F. Supp. 2d at 947 n.7 ("[T]his Court's prior experience as well as the bidding results in the present case confirm that the cited mythic norm [of 25 percent to 35 percent] is grossly excessive even where substantially smaller [than $100 million] amounts are at stake.")

The remaining question is whether the findings discussed above apply to a hypothetical *ex ante* negotiation in the consumer class action context, or merely to securities and antitrust cases. The court believes the findings from securities and antitrust cases provide some guidance regarding the *ex ante* negotiation in any type of class action. As Eisenberg and Miller concluded in 2004 and again in 2010, "the overwhelmingly important determinant of the fee is simply the size of the recovery obtained by the class," not the subject matter of the litigation. 7 J. Empirical Legal Studies at 250. All of the empirical studies surveying past awards found similar across-the-board percentage awards for securities, antitrust, and consumer class actions. *Id.* at 264 (Tab. 5); 7 J. Empirical Legal Studies at 835 (Tab. 8). Additionally, this court's informal analysis discussed earlier in this opinion, and which the court could not have conducted without the

diligent assistance of counsel, confirmed that the same conclusion applies to the TCPA subset of consumer class actions. Furthermore, the court has no reason to believe that securities or antitrust cases are any more or less predictable than consumer class actions, such that counsel would be willing to negotiate a scaled fee schedule in one set of cases but not the other. As the Seventh Circuit explained in *Silverman*, a downward scaling fee arrangement is well-suited to securities litigation because a large portion of class counsel's expenses must be devoted to establishing liability, whereas damages can be calculated mechanically from movements in stock prices. *Silverman*, 739 F.3d at 959. That applies equally, if not more, to TCPA cases because nearly all of counsel's efforts are devoted to determining liability. Damages are fixed by statute.

**3. Court's Estimation of the Market Rate for TCPA Class Actions Exclusive of Risk**

The Seventh Circuit acknowledged in *Synthroid I* that it is, of course, "impossible to know *ex post* the outcome of a hypothetical bargain *ex ante* . . . . [b]ut a court can learn about *similar* bargains." *Synthroid I*, 264 F.3d at 719 (emphasis original). That is what the court has endeavored to do in the preceding sections and the court now draws the following conclusions. First, given the class's inability to effectively monitor counsel, an *ex ante* negotiation would have produced a fee arrangement based on a percentage of the recovery. Second, the data available on past awards in TCPA cases and other class actions show that the mean and median recovery for a $75.5 million TCPA case are between 20% and 24% of the settlement fund. Third, an *ex ante* negotiation between Class Counsel and class members in this case, had individual class members had a real stake in the litigation, would have produced a downward scaling fee arrangement. *See Silverman*, 739 F.3d at 959 ("The [empirical data] reinforce the observation in the *Synthroid* opinions that negotiated fee agreements regularly provide for a recovery that increases at a decreasing rate.") Fourth, given the $75.5 million recovery, the downward scaling fee

arrangement would have produced an actual percentage award below or toward the bottom of Eisenberg and Miller's 20% to 24% range for similarly sized settlements.

The special master appointed by Judge Gettleman in *Trans Union* observed, correctly, that determining the criteria for the hypothetical negotiation is the easy part; attaching actual numbers to the hypothetical downward scaling fee agreement is "more art than science." *Trans Union*, 2009 WL 4799954, at *15. As a starting point, the court applies a slightly modified version of the fee schedule set out by the Seventh Circuit in *Synthroid II* because *Synthroid II* is the only consumer class action known to this court where the parties (or in this case the court) estimated a downward scaling fee agreement in a consumer class action.[13] *Synthroid II*, 325 F.3d at 980. As demonstrated in the table below, applying the modified *Synthroid II* scale to the total recovery in this case yields a result that is largely consistent with the conclusions drawn from the court's analysis in Section II.C.2. The fee structure affords Class Counsel a relatively high rate for the initial recovery consistent with Class Counsel's need to devote most of their efforts to determining liability. The marginal rates diminish as the recovery increases because, notwithstanding the class's desire to incentivize counsel to seek a higher award, the measure of damages depends more on the number of class members (or phone calls) than the additional efforts of counsel. Finally, the modified *Synthroid II* structure produces an actual percentage fee of 19.97%, which is .03% below Eisenberg and Miller's 20% to 24% range for similarly sized settlements.

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[13] In *Synthroid II*, the Seventh Circuit set the third "recovery tier" of the consumer class fee schedule at $20-$46 million because it used the total recovery by third-party payers, $46 million, to benchmark the consumer class scale. Here, the court adopts $20-$45 million as the recovery range for the third tier of the estimated fee scale because fee scales negotiated *ex ante*, including those surveyed above, generally reflect uniform recovery ranges—in this case, multiples of five.

| **Application of Modified *Synthroid II* Structure** | | |
|---|---|---|
| **Recovery** | **Fee Percentage** | **Fee** |
| First $10 million | 30% | $3,000,000 |
| Next $10 million | 25% | $2,500,000 |
| $20 – 45 million | 20% | $5,000,000 |
| Excess above $45 million ($30,455,099) | 15% | $4,568,265 |
| **Total Fee** | **19.97%** | **$15,068,265** |

In light of the *Synthroid II* structure's fit with this court's observations about the TCPA class-action market, and the fact that the *Synthroid II* structure resembles the fee schedules actually put forth by lawyers in an *ex ante* negotiations (although it is admittedly less tailored), the court adopts the *Synthroid II* structure as its estimation of the market contingent fee for a $75.5 million TCPA class action independent of the risks associated with a particular case.

**4. Risk of the Litigation**

The last factor the Seventh Circuit instructs a district court to consider is the risk plaintiffs' lawyers face of possibly losing the litigation when they undertake class representation. The estimated magnitude of the risk necessarily affects the price at which Class Counsel in this case would have been willing to offer their services in an *ex ante* negotiation, had such a negotiation occurred. *See Synthroid I*, 264 F.3d at 721. The Seventh Circuit has explained the risk premium in fee negotiations with the following hypothetical: "[I]f the market-determined fee for a sure winner were $1 million the market-determined fee for handling a similar suit with only a 50 percent change of a favorable outcome should be $2 million." *Trans Union*, 629 F.3d at 746 (citations omitted).

As this court discussed earlier in this opinion, Class Counsel in this case faced a variety of serious obstacles to success in bringing the lawsuit, and faced the real prospect of recovering nothing. First, it was quite possible that the discovery may have revealed that many class members acquiesced to receiving calls on their cell phones when they agreed to their cardholder agreements with Capital One. Some customers provided Capital One with their cell phone numbers as their primary contact numbers, arguably waiving any right not to receive debt-collection calls on their cell phone from Capital One. Second, at the outset of the litigation there was a serious question whether the Plaintiffs' claims could meet Rule 23's manageability requirement given that Capital One would have to review its records to determine which class members provided consent through cardholder agreements, which class members actually provided their cell phone numbers to Capital One, and whether each class member actually owned their cell phone number at the time Capital One called it using an autodialer. Third, as Capital One has noted throughout this litigation, there are presently petitions before the FCC urging the FCC to (1) revise the TCPA's definition of "automatic telephone dialing system" to exclude dialers like those used by Capital One, and (2) provide a safe harbor for all calls that Capital One inadvertently made to wrong numbers. Consequently, the longer this litigation were to continue, the longer Plaintiffs would be exposed to the possibility that the FCC would take action that might extinguish Plaintiffs' claims.

On the flip side, Capital One's potential monetary liability in this litigation is staggering. Even if each of the 7.5 million class members in this case had only received one phone call a piece and could not prove that any of the calls were made in willful violation of the TCPA, Capital One's exposure is still greater than $8.7 billion. That type of potentially bankruptcy-level exposure is sufficient to compel an *in terrorem* settlement before a liability determination is made and is accordingly a factor that reduces Class Counsel's risk of non-payment. *See AT&T*

*Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting class actions can produce *in terrorem* settlements).

The precise level of risk faced by Class Counsel more than two years ago, when the cases were filed, is difficult for a district court to determine and quantify after the fact. The Seventh Circuit, however, has criticized at least one district court for failing to make an attempt to do so. *See Trans Union*, 629 F.3d at 746-48. As hard as the task may be, this court will endeavor to determine an appropriate risk multiplier. After preliminary approval of the Class Settlement and after the court granted limited discovery of Class Counsel's lodestar information in this case and other TCPA cases, Professor Todd Henderson submitted a report on behalf of class member objector Jeffery Collins. Professor Henderson's report calculated that Class Counsel recovered on behalf of the various classes they had represented (and themselves) in about 43% of past TCPA cases.[14] (Dkt. No. 294 ¶ 10.) Professor Henderson's determination was based on the limited sample of TCPA cases in which Class Counsel participated. It is, however, the best information available to court. As a result, the court assumes the average TCPA case carries a 43% chance of success, and the question the court ultimately must answer is whether Class Counsel in this case faced a greater or lesser chance of prevailing. Considering the circumstances of this case, the court believes that the class members' consent issues made the representation riskier than a typical TCPA class action, but only slightly so after considering the strong incentives to settlement created by the magnitude of Capitol One's potential liability.

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[14] Professor Henderson further determined that after adjusting for the amount of effort Class Counsel invested in each case, about 64% of Class Counsel's total investments were in cases in which they recovered. (*Id.* ¶ 10.) Because the court is concerned with the riskiness of this case relative to other TCPA cases, however, it adopts Professor Henderson's 43% estimate, unadjusted for Class Counsel's investment savvy.

The next question the court now faces is how to adjust the market fee structure the court has determined, as discussed earlier in this opinion, to account for the increased risk Class Counsel faced of losing. Eisenberg and Miller in their 2010 study concluded that "high risk" consumer class actions yield a percentage fee premium of about 6% above the "low or medium risk" cases. 7 J. Empirical Legal Studies at 265 (Tab. 8). Absent better information and in light of the court's determination that this case was only slightly riskier than a typical TCPA class action, the court adopts Eisenberg and Miller's risk premium and applies it to the court's estimated market rate. Although Eisenberg and Miller's 6% premium applied to the entire fee award, such an application does not make sense in a case like this one, where the risk existed only with regard to liability, not damages. Each of the potential impediments to establishing Capital One's liability: the class members' alleged consent to be called; Rule 23 manageability issues; and potentially forthcoming FCC orders; only affected Class Counsel's ability to prove their case on liability and consequently their ability to recover any damages. Once the risk resulting from the impediments to establishing liability was overcome and Capital One's liability established, Class Counsel's ability to obtain a large recovery was no longer materially affected by that risk. As discussed above, one of the purposes of a downward scaling fee schedule is to account for cases where the marginal costs of increasing the class's damages recovery are low. Class counsel in an *ex ante* negotiation must nevertheless be provided an incentive to take the case at the outset and seek the highest award on behalf of the class that is reasonable under the facts and law of the case.

Because all of the risk factors in this case were limited to the question of Capital One's liability, it follows that the risk premium related to Class Counsel's fees should apply only to the attorneys' fees associated with the initial recovery tier negotiated between Class Counsel and the sophisticated class members before the case was filed. In the hypothetical *ex ante* negotiation,

Class Counsel would have desired compensation for their enhanced risk regardless of the eventual level of recovery; the way to affect that desire is by incorporating the risk premium into the attorney fee percentage related to the first recovery tier. Sophisticated class members, by contrast, would have balked at agreeing to a similar adjustment to the second, third, and fourth recovery tiers, because the risk factors present in this case related only to establishing liability and would not have affected Class Counsel's ability to achieve the additional damages recovery reflected in second, third and fourth tiers. The court therefore applies the 6% premium only to the first $10 million in the first tier of the market fee structure. The court's risk-adjusted market contingent fee structure is set forth in the table below, and nets Class Counsel an additional $600,000.

| **Risk-Adjusted Fee Structure** | | |
|---|---|---|
| **Recovery** | **Fee Percentage** | **Fee** |
| First $10 million | 36% | $3,600,000 |
| Next $10 million | 25% | $2,500,000 |
| $20 to $45 million | 20% | $5,000,000 |
| Excess above $45 million ($30,455,099) | 15% | $4,568,265 |
| **Total Fee** | **20.77%** | **$15,668,265** |

**5. Professor Henderson's Model**

Lastly, as discussed earlier, the court granted objector Jeffrey Collins's request for discovery of information from Class Counsel regarding Class Counsel's hours and hourly fees to calculate the lodestar in this case and in Class Counsel's previous TCPA class cases. Collins sent Class Counsel's information to Professor Henderson, who in turn filed a report analyzing the data and proposing an alternative method for approximating the *ex ante* market rate at the

conclusion of a case. Collins's counsel acknowledged at the final approval hearing that no district court or court of appeals has ever adopted Professor Henderson's methodology. (Dkt. No. 324 at 54:17-19.) This court similarly declines to apply Professor Henderson's method of estimating the appropriate fee award in this case. Professor Henderson's model, though not applied, nevertheless merits a brief discussion.

Using Class Counsel's lodestar data, Professor Henderson determined that Class Counsel, who are highly experienced, achieve a recovery for their "clients" in approximately 43% of their TCPA cases. (Dkt. No. 294 ¶ 10.) But after adjusting for Class Counsel's tendency to devote substantially more professional time to their winning cases than to their losing cases, Henderson concluded that Class Counsel have a 64% chance of obtaining recovery for any given dollar of lodestar invested in TCPA litigation. Given a 64% chance of recovery, Henderson determined that Class Counsel need only obtain a weighted average 1.57 lodestar multiplier in successful cases to compensate Class Counsel for their lodestar investment and the contingent risk Class Counsel faces in TCPA class action litigation. (*Id.*) Applying that multiplier to this case, Professor Henderson concluded that Class Counsel would have represented the class in this case for 4.6% of the total recovery had they been forced to compete for the legal work at the outset of the case.[15]

Professor Henderson's model may possibly be a good predictor of the going rate in a competitive market of homogenous plaintiffs lawyers. It does not, however, comport with the Seventh Circuit's guidance requiring the court to hypothetically approximate an *ex ante* fee negotiation. As a threshold matter, Professor Henderson's model relies exclusively on data

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[15] (Multiplier (1.57) × Lodestar ($2,213,769)) ÷ Recovery ($75,455,099) = 4.6%. Professor Henderson's model is more complicated than the court's basic description here. For purposes of this opinion, however, and because the court did not apply Professor Henderson's approach, the court's summary will suffice.

relating to cases that were resolved after Class Counsel filed this case. That is not a criticism of Professor Henderson's methodology—he had no choice because he was limited to the data available through discovery. The limitation, however, does undermine the applicability of Professor Henderson's model to this case. Class Counsel did not know, at the outset of the litigation, that they needed only to achieve a 1.57 lodestar multiplier to compensate themselves for the contingent risk, and accordingly could not have relied on that multiplier to formulate their hypothetical *ex ante* bid for the legal work in this case. Professor Henderson's model also assumes "a hypothetical competitive market for plaintiffs' lawyers' services," without ever establishing that such a market exists. (Dkt. No. 294 ¶ 64.) The court's job is to approximate the market as it existed before the litigation, including the degree of competition. In doing so, the court cannot assume a perfectly competitive market without the benefit of reviewing additional evidence that is absent from this record. Indeed, the joint representation model present in this case and many of the comparable TCPA cases suggests that the market among plaintiffs class action lawyers, at least for large TCPA cases, may not be highly competitive. *See also* Joseph Ostoyich and William Lavery, *Looks Like Price-Fixing Among Class Action Plaintiffs Firms*, Law360 (Feb. 12, 2014 11:30 AM), http://www.law360.com-/articles/542260/looks-like-price-fixing-among-class-action-plaintiffs-firms.

Ultimately, the court must follow the Seventh Circuit's guidance in approximating the fee that would have been negotiated *ex ante* in this TCPA case had such a negotiation occurred. Unfortunately for Professor Henderson, his model is not among the methods accepted by the Seventh Circuit. Using the benchmarks set forth in *Synthroid I*, as explained above, the court concludes that the tiered fee arrangement displayed above, which approximates the agreed-upon negotiated percentage of the attorneys' fees to be taken from a $75.5 million settlement had Class Counsel negotiated with capable, sophisticated class members having a real stake in the

litigation, is about 20%. Although the court noted earlier that the fairness of a fee percentage is to be considered against the total value of the settlement to the class less administrative and notice costs, the benchmarks the court used to determine the market rate evaluated fees as a percentage of the total recovery. The court therefore grants Class Counsel $15,668,265 of fees which is equal to about 20.77%, or about one fifth, of the entire $75,455,099 settlement fund.

The court further grants Class Counsel's requested incentive awards for the Named Plaintiffs in the amount of $5,000 each. Incentive payments sufficient to induce Named Plaintiffs to participate in the lawsuit are appropriate in the Seventh Circuit and, given the circumstances in this case, were necessary. *Continental*, 962 F.2d at 571. Moreover, a $5,000 award is consistent with the awards granted by other courts in this district in similar litigation. *See AT&T Mobility*, 792 F. Supp. 2d at 1041 (collecting cases).

The Settlement Agreement states that Defendants' contributions to the settlement fund are non-reversionary, (Settlement Agreement § 2.42), and that the settlement will "continue to be effective and enforceable by the Parties," in the event that the court declines Class Counsel's fee request or awards less than the amounts sought (*id.* § 5.03). But the Settlement Agreement is silent on the matter of who, precisely, should receive the additional funds available should the court reduce the requested fee award, as it has done here. For the avoidance of doubt, the court orders that the additional money available as a result of its reduction to Class Counsel's requested fee should go to the class members who made timely claims. After incorporating the court's reduced fee award, the money available to class as result of the settlement is $54,668,834, which results in a payment to each timely claimant of at least $39.66, and possibly more if some claimants fail to deposit their settlement checks within 210 days.

## CONCLUSION

For the reasons set forth above, Plaintiffs' motion for final approval of the class action settlement [260] is granted. The settlement is fair, reasonable, and adequate. Class Counsel's motion for approval of attorneys' fees [175] is granted in part and denied in part. The court awards attorneys' fees and costs in the total amount of $15,668,265 (about 20.77% of the $75,455,099 settlement amount) and incentive awards of $5,000 to each of the five Named Plaintiffs.

ENTER:

JAMES F. HOLDERMAN
District Judge, United States District Court

Date: February 12, 2015

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

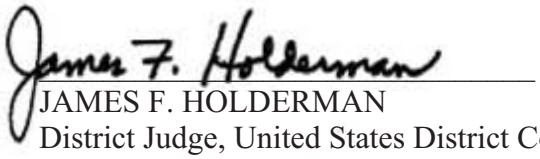
| | |
|---|---|
| IN RE CAPITAL ONE TELEPHONE CONSUMER PROTECTION ACT LITIGATION, | Master Docket No. 12 C 10064<br>MDL No. 2416 |
| BRIDGETT AMADECK, et al.,<br><br>v.<br><br>CAPITAL ONE FINANCIAL CORPORATION, and CAPITAL ONE BANK (USA), N.A. | No. 12 C 10135 |
| NICHOLAS MARTIN, et al.,<br><br>v.<br><br>LEADING EDGE RECOVERY SOLUTIONS, LLC, and CAPITAL ONE BANK (USA), N.A. | No. 11 C 5886 |
| CHARLES C. PATTERSON,<br><br>v.<br><br>CAPITAL MANAGEMENT SERVICES, L.P. and CAPITAL ONE BANK (USA), N.A. | No. 12 C 1061 |

**ORDER PROVIDING TCPA CLASS ACTION SETTLEMENT DATA**

JAMES F. HOLDERMAN, District Judge:

As stated in the court's February 12, 2015 Memorandum Opinion and Order [329], the court provides in this separate order the TCPA class action settlement data filed by class counsel in *Wilkins* v. *HSBC Bank*, No. 14 C 190 (N.D. Ill.) (Dkt. No 109-1). The court used these data to perform the informal analysis of TCPA class action settlements contained in Section II.C.2.ii. of the court's Memorandum Opinion and Order.

ENTER:



JAMES F. HOLDERMAN
District Judge, United States District Court

Date: February 12, 2015

**Settlements in TCPA Class Actions Submitted to the Court by Counsel in *Wilkins* v. *HSBC Bank*, No. 14 C 190 (N.D. Ill.) (Dkt. No. 109-1)**

| Case Name and Court Information | Total Settlement Recovery | Attorneys' Fee Award | Attorneys' Fee Ratio |
|---|---|---|---|
| | (Dollars) | (Dollars) | (Percent) |
| (a) | (b) | (c) | (d) |
| Lo v. Oxnard European Motors, LLC et al., Case No. 3:11-cv-01009 (S.D. Cal.) | $ 49,100 | $ 12,275 | 25.0 % |
| Saf-T-Gard International v. Vanguard Energy Services, LLC, Case No. 1:12-cv-03671 (N.D. Ill.) | 59,500 | 19,635 | 33.0 |
| Heller v. HRB Tax Group, Inc., Case No. 4:11-cv-01121 (E.D. Mo.) | 91,150 | 31,717 | 34.8 |
| Martin v. TaxWorks, Inc., Case No. 1:12-cv-05485 (N.D. Ill.) | 225,000 | 74,993 | 33.3 |
| R. Rudnick & Co. v. G.F. Protection, Inc., et al., Case No. 1:08-cv-01856 (N.D. Ill.) | 265,000 | 79,500 | 30.0 |
| Able Home Health v. Oxygen Qualifying Servs., Inc., Case No. 3:09-cv-50128 (N.D. Ill.) | 270,000 | 81,000 | 30.0 |
| CE Design, Ltd. v. Exterior Sys., Inc., Case No. 1:07-cv-00066 (N.D. Ill.) | 315,334 | 105,110 | 33.3 |
| Sadowski v. Med1Online, Case No. 1:07-cv-02973 (N.D. Ill.) | 345,000 | 103,500 | 30.0 |
| Garret, et al. v. Sharps Compliance, Inc., Case No. 1:10-cv-04030 (N.D. Ill.) | 350,000 | 105,000 | 30.0 |
| Lindsay Transmission v. Office Depot, Inc., Case No. 4:12-cv-00221 (E.D. Mo.) | 381,150 | 125,780 | 33.0 |
| Holtzman v. CCH Inc., Case No. 1:07-cv-07033 (N.D. Ill.) | 397,000 | 132,333 | 33.3 |
| Garrett et al. v. Ragle Dental Laboratory, Inc., et al., Case No. 1:10-cv-01315 (N.D. Ill.) | 475,000 | 142,500 | 30.0 |
| Balbarin v. North Star Capital Acquisition, LLC, et al., Case No. 1:10-cv-01846 (N.D. Ill.) | 500,000 | 166,667 | 33.3 |
| Lemieux v. Global Credit & Collection Corp., Case No. 3:08-cv-01012 (S.D. Cal.) | 505,000 | 193,884 | 38.4 |
| Espinal v. Burger King Corp., et al., Case No. 1:09-cv-20982 (S.D. Fla.) | 510,000 | 170,000 | 33.3 |
| Fike v. The Bureaus, Inc., Case No. 1:09-cv-02558 (N.D. Ill.) | 800,000 | 200,000 | 25.0 |
| Sawyer v. Atlas Heating and Sheet Metal Works Inc., Case No. 2:10-cv-00331 (E.D. Wis.) | 900,000 | 315,000 | 35.0 |
| Bellows v. NCO Financial Systems, Inc., Case No. 3:07-cv-01413 (S.D. Cal.) | 950,000 | 299,254 | 31.5 |
| Meilleur v. AT&T Corp., Case No. 2:11-cv-01025 (W.D. Wash.) | 973,905 | 750,000 | 77.0 |
| Grannan v. Alliant Law Group, P.C., Case No. 5:10-cv-02803 (N.D. Cal.) | 1,000,000 | 250,000 | 25.0 |
| Brian J. Wanca, J.D., P.C. v. L.A. Fitness International, LLC, Case No. 11-cv-4311 (Cir. Ct. Lake County, Illinois) | 1,089,000 | 359,370 | 33.0 |

**Settlements in TCPA Class Actions Submitted to the Court by Counsel in *Wilkins* v. *HSBC Bank*, No. 14 C 190 (N.D. Ill.) (Dkt. No. 109-1)**

| Case Name and Court Information | Total Settlement Recovery | Attorneys' Fee Award | Attorneys' Fee Ratio |
|---|---|---|---|
| | (Dollars) | | (Percent) |
| (a) | (b) | (c) | (d) |
| Cain v. Consumer Portfolio Servs., Inc., Case No. 1:10-cv-02697 (N.D. Ill.) | 1,100,000 | 363,000 | 33.0 |
| Wilder Chiropractic, Inc. v. Pizza Hut of Southern Wisconsin, Inc., Case No. 3:10-cv-00229 (W.D. Wis.) | 1,296,000 | 432,000 | 33.3 |
| Bailey Brothers Plumbing, Heating and Air Conditioning, Inc. v. Papa's Leatherbarn LLC, Case No. 5:10-cv-00080 (W.D. Okla.) | 1,318,000 | 439,333 | 33.3 |
| Sarabi v. Weltman, Weinberg & Reis Co., Case No. 3:10-cv-01777 (S.D. Cal.) | 1,350,000 | 225,000 | 16.7 |
| Clearbrook v. RoofLifters, LLC, Case No. 1:08-cv-03276 (N.D. Ill.) | 1,400,000 | 420,000 | 30.0 |
| Targin Sign Sys., Inc. v. Preferred Chiropractic Ctr., Ltd., Case No. 1:09-cv-01399 (N.D. Ill.) | 1,551,000 | 517,000 | 33.3 |
| Cubbage v. The Talbots, Inc. et al., Case No. 2:09-cv-00911 (W.D. Wash.) | 1,570,000 | 400,000 | 25.5 |
| Avio, Inc. v. Creative Office Solutions, Inc., Case No. 2:10-cv-10622 (E.D. Mich.) | 1,587,000 | 529,000 | 33.3 |
| Locklear Elec., Inc. v. Norma L. Lay, Case No. 3:09-cv-00531 (S.D. Ill.) | 1,665,437 | 584,387 | 35.1 |
| Geismann, M.D., P.C. v. Allscripts Healthcare Solutions, Inc., Case No. 1:09-cv-05114 (N.D. Ill.) | 1,889,000 | 566,700 | 30.0 |
| Siding and Insulation Co. v. Beachwood Hair Clinic, Inc., Case No. 1:11-cv-01074 (N.D. Ohio) | 1,956,650 | 600,000 | 30.7 |
| Martin v. CCH, Inc., Case No. 1:10-cv-03494 (N.D. Ill.) | 2,000,000 | 600,000 | 30.0 |
| Paldo Sign and Display Company v. Topsail Sportswear, Case No. 1:08-cv-05959 (N.D. Ill.) | 2,000,000 | 666,667 | 33.3 |
| Wojcik v. Buffalo Bills, Inc., Case No. 8:12-cv-02414 (M.D. Fla.) | 2,487,745 | 562,500 | 22.6 |
| The Savanna Group, Inc. et al v. Trynex, Inc., Case No. 1:10-cv-07995 (N.D. Ill.) | 2,550,000 | 850,000 | 33.3 |
| G.M. Sign, Inc. v. Finish Thompson, Inc., Case No. 1:07-cv-05953 (N.D. Ill.) | 3,000,000 | 1,000,000 | 33.3 |
| Saf-T-Gard Int'l v. Seiko Corp. of Am., Case No. 1:09-cv-00776 (N.D. Ill.) | 3,500,000 | 1,155,000 | 33.0 |
| CE Design Ltd. v. Cy's Crab House North, Inc., Case No. 1:07-cv-05456 (N.D. Ill.) | 3,647,500 | 1,215,833 | 33.3 |
| Clark v. Payless ShoeSource, Inc., Case No. 2:09-cv-00915 (W.D. Wash.) | 3,809,988 | 301,834 | 7.9 |
| Hanley v. Fifth Third Bank, Case No. 1:12-cv-01612 (N.D. Ill.) | 4,500,000 | 1,500,000 | 33.3 |
| Hovila v. Tween Brands, Inc. Case No. 2:09-cv-00491 (W.D. Wash.) | 4,500,000 | 750,000 | 16.7 |

**Settlements in TCPA Class Actions Submitted to the Court by Counsel in *Wilkins* v. *HSBC Bank*, No. 14 C 190 (N.D. Ill.) (Dkt. No. 109-1)**

| Case Name and Court Information | Total Settlement Recovery | Attorneys' Fee Award | Attorneys' Fee Ratio |
|---|---|---|---|
| | (Dollars) | | (Percent) |
| (a) | (b) | (c) | (d) |
| Chesbro v. Best Buys Stores, L.P., Case No. 2:10-cv-00774 (W.D. Wash.) | 4,550,000 | 1,137,500 | 25.0 |
| Saf-T-Gard v. Transworld Systems, Case No. 1:10-cv-07671 (N.D. Ill.) | 5,356,800 | 240,000 | 4.5 |
| Palmer v. Sprint Solutions, Inc., Case No. 2:09-cv-01211 (W.D. Wash.) | 5,500,000 | 1,540,000 | 28.0 |
| Hinman v. M and M Rental Center, Inc., Case No. 1:06-cv-01156 (N.D. Ill.) | 5,817,150 | 1,939,050 | 33.3 |
| Miller v. Red Bull North America, Inc., Case No. 1:12-cv-04961 (N.D. Ill.) | 6,000,000 | 1,275,000 | 21.3 |
| Pimental v. Google, Inc., Case No. 4:11-cv-02585 (N.D. Cal.) | 6,000,000 | 1,500,000 | 25.0 |
| Sandusky Wellness Center, LLC v. Heel, Inc., Case No. 3:12-cv-01470 (N.D. Ohio) | 6,000,000 | 2,000,000 | 33.3 |
| Weinstein v. Airit2me, Inc., et al., Case No. 1:06-cv-00484 (N.D. Ill.) | 7,000,000 | 1,625,000 | 23.2 |
| Martin v. Dun & Bradstreet, Inc., Case No. 1:12-cv-00215 (N.D. Ill.) | 7,500,000 | 1,666,666 | 22.2 |
| Woodman, et al. v. ADT Dealer Servs. et al., Case No. 2013-CH-10169 (Cir. Ct. Cook County, Illinois) | 7,500,000 | 1,875,000 | 25.0 |
| Gutierrez, et al. v. Barclays Group, et al., Case No. 3:10-cv-01012 (S.D. Cal.) | 8,184,875 | 1,574,000 | 19.2 |
| Steinfeld, et al. v. Discover Financial Services, et al., Case No. 3:12-cv-01118 (N.D. Cal.) | 8,700,000 | 2,175,000 | 25.0 |
| Adams v. AllianceOne Receivables Management, Inc., Case No. 3:08-cv-00248 (S.D. Cal.) | 9,000,000 | 2,700,000 | 30.0 |
| Cummings v. Sallie Mae, Inc., Case No. 1:12-cv-09984 (N.D. Ill.) | 9,250,000 | 3,052,500 | 33.0 |
| Spillman v. RPM Pizza, LLC, Case No. 3:10-cv-00349 (M.D. La.) | 9,750,000 | 2,535,000 | 26.0 |
| Robles v. Lucky Brand Dungarees, et al., Case No. 3:10-cv-04846 (N.D. Cal.) | 9,900,000 | 2,400,000 | 24.2 |
| Ellison v. Steve Madden, Ltd., Case No. 2:11-cv-05935 (C.D. Cal.) | 10,000,000 | 1,250,000 | 12.5 |
| Kazemi v. Payless ShoeSource, Inc. et al., Case No. 3:09-cv-05142 (N.D. Cal.) | 10,000,000 | 1,250,000 | 12.5 |
| Satterfield v. Simon & Schuster, Case No. 4:06-cv-02893 (N.D. Cal.) | 10,000,000 | 2,500,000 | 25.0 |
| Kramer v. Autobytel, Inc., et al., Case No. 4:10-cv-02722 (N.D. Cal.) | 12,200,000 | 3,050,000 | 25.0 |
| Desai v. ADT Security Systems, Case No. 1:11-cv-01925 (N.D. Ill.) | 15,000,000 | 5,000,000 | 33.3 |

**Settlements in TCPA Class Actions Submitted to the Court by Counsel in *Wilkins* v. *HSBC Bank*, No. 14 C 190 (N.D. Ill.) (Dkt. No. 109-1)**

| Case Name and Court Information | Total Settlement Recovery | Attorneys' Fee Award | Attorneys' Fee Ratio |
|---|---|---|---|
| | (Dollars) | | (Percent) |
| (a) | (b) | (c) | (d) |
| Addison Automatics, Inc. v. Precision Electronic Class, Inc., et al., Case No. 1:10-cv-06903 (N.D. Ill.) | 15,878,500 | 5,292,833 | 33.3 |
| Lockett v. Mogreet, Inc., Case No. 2013-CH-21352 (Cir. Ct. Cook County, Illinois) | 16,000,000 | 2,850,000 | 17.8 |
| Lozano v. Twentieth Century Fox, Case No. 1:09-cv-06344 (N.D. Ill.) | 16,000,000 | 3,750,000 | 23.4 |
| Agne v. Papa John's International, et al., Case No. 2:10-cv-01139 (W.D. Wash.) | 16,585,000 | 2,450,000 | 14.8 |
| Malta v. Freddie Mac & Wells Fargo Home Mortgage, Case No. 3:10-cv-01290 (S.D. Cal.) | 17,100,000 | 3,847,500 | 22.5 |
| Rojas v. Career Education Center, Case No. 1:10-cv-05260 (N.D. Ill.) | 19,999,400 | 3,500,000 | 17.5 |
| Arthur, et al. v. Sallie Mae, Inc., Case No. 2:10-cv-00198 (W.D. Wash.) | 24,150,000 | 4,830,000 | 20.0 |
| Kwan v. Clearwire Corp., Case No. 2:09-cv-01392 (W.D. Wash.) | 29,300,000 | 2,900,000 | 9.9 |
| In re Jiffy Lube International, Inc. Text Spam Litig., Case No. 3:11-MD-02261 (S.D. Cal.) | 39,883,585 | 4,750,000 | 11.9 |

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | |
|---|---|
| IN RE CAPITAL ONE TELEPHONE CONSUMER PROTECTION ACT LITIGATION | Master Docket No. 1:12-cv-10064<br>MDL No. 2416 |
| This document relates to:<br><br>BRIDGETT AMADECK, et al.,<br><br>v.<br><br>CAPITAL ONE FINANCIAL CORPORATION, and CAPITAL ONE BANK (USA), N.A. | Case No: 1:12-cv-10135 |
| This document relates to:<br><br>NICHOLAS MARTIN, et al.,<br><br>v.<br><br>LEADING EDGE RECOVERY SOLUTIONS, LLC, and CAPITAL ONE BANK (USA), N.A. | Case No: 1:11-cv-05886 |
| This document relates to:<br><br>CHARLES C. PATTERSON,<br><br>v.<br><br>CAPITAL MANAGEMENT SERVICES, L.P. and CAPITAL ONE BANK (USA), N.A. | Case No: 1:12-cv-01061 |

**FINAL ORDER OF DISMISSAL AND FINAL JUDGMENT**

The Court having held a Final Approval Hearing on January 15, 2015, having issued a Memorandum Opinion and Order granting Plaintiffs' motion for final approval of the class action settlement on February 12, 2015 (Dkt. 329), and having considered all matters submitted to it at the Final Approval Hearing and otherwise, and finding no just reason for delay in entry of this Final Order of Dismissal and Final Judgment ("Order and Final Judgment") and good cause appearing therefore,

It is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. Unless defined herein, all capitalized terms in this Order and Final Judgment shall have the respective meanings and the same terms in the Amended Settlement Agreement (the "Amended Settlement Agreement") (Dkt. 131-1), a copy of which is attached hereto as an Exhibit and incorporated herein by reference. The Court specifically notes that the term "Litigation," as used in this Order and Final Judgment, shall have the same meaning ascribed to "This Litigation" set forth in Section 2.27 of the Amended Settlement Agreement (i.e., "the action described by the Consolidated Master Class Action Complaint filed in the Northern District of Illinois on February 28, 2013, as amended by the Amended Consolidated Master Class Action Complaint.") (*See* Dkts. 19, 120.)

2. The Amended Settlement Agreement was entered into by and between plaintiffs Bridgett Amadeck, Tiffany Alarcon , Charles C. Patterson, David Mack, and Andrew Kalik, (together, "Plaintiffs") for themselves and the Settlement Class Members, on the one hand, and, on the other hand, Capital One Bank (USA), N.A., Capital One, N.A., Capital One Financial Corporation, Capital One Services, LLC, Capital One Services II, LLC (together, "Capital One"), and the following Participating Vendors who made calls on behalf of Capital One: Capital Management Systems, LP, Leading Edge Recovery Solutions, LLC, and AllianceOne

Receivables Management, Inc. (collectively, with Capital One, "Defendants"). Plaintiffs and Defendants are referred to collectively in this Order and Final Judgment as the "Parties."

3. The terms of this Court's July 29, 2014, Preliminary Approval Order (Dkt. 137) and the Court's February 12, 2015, Memorandum Opinion and Order granting Plaintiffs' motion for final approval of the class action settlement ("Final Approval Order") (Dkt. 329), are also incorporated by reference in this Order and Final Judgment.

4. This Court has jurisdiction over the subject matter of the Litigation and over the Parties, including all members of the following Settlement Class certified for settlement purposes in this Court's Preliminary Approval Order (Dkt. 137):

> SETTLEMENT CLASS: All persons within the United States who received a non-emergency telephone call from Capital One's dialer(s) to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from January 18, 2008, through June 30, 2014, and all persons within the United States who received a non-emergency telephone call from a Participating Vendor's dialer(s) made on behalf of Capital One to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from February 28, 2009, through June 30, 2014. Excluded from the Settlement Class are Defendants and any affiliate or subsidiary of Defendants, and any entities in which any of such companies have a controlling interest, as well as all persons who validly opt out of the Settlement Class.

5. A total of 462 Settlement Class Members submitted timely and proper Requests for Exclusion. (*See* Dkt. 305 at 4 and Dkt. 305 Attachment 1.) The Court hereby orders that each of those individuals is excluded from the Settlement Class. Those individuals will not be bound by the Amended Settlement Agreement, and neither will they be entitled to any of its benefits. Those individuals will not be bound by this Order and Final Judgment or the Releases herein.

6. A total of 18 Settlement Class Members submitted timely and proper Objections to the Amended Settlement Agreement. (*See* Dkt. 264 at 18.) Having considered those Objections and the Parties' responses to them, the Court finds that none of them are well founded and each is overruled in its entirety. The Court received an untimely objection, which Plaintiffs moved to strike as untimely and not well founded. (Dkt. Nos. 327, 331.) The Court hereby orders that the objection of Pamela Sweeney be stricken.

7. As of the date of this Order and Final Judgment, a total of 1,378,534 Settlement Class Members submitted timely and proper claims. The Court hereby orders that these claims, and any other claims subsequently determined to be timely and proper by the Class Administrator pursuant to the terms set forth in the Amended Settlement Agreement, be treated as Approved Claims for purposes of distributing the Settlement Fund.

8. The Court hereby finds and concludes that Class Notice was disseminated to the Settlement Class Members in accordance with the terms set forth in Section 8 of the Amended Settlement Agreement, and that Class Notice and its dissemination were in compliance with this Court's Preliminary Approval Order.

9. The Court further finds and concludes that the Class Notice and claims submission procedures set forth in Section 8 and 9 of the Amended Settlement Agreement fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all Settlement Class Members who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Class as contemplated in the Amended Settlement Agreement and this Order and Final Judgment.

10. This Court hereby finds and concludes that the notice provided by the Class Administrator to the appropriate State and federal officials pursuant to 28 U.S.C. § 1715 fully satisfied the requirements of that statute.

11. The Amended Settlement Agreement is finally approved as fair, reasonable, adequate, and in the best interests of the settlement Class, for the reasons set forth herein and in the Final Approval Order (Dkt. 329). The Plaintiffs in this Litigation, in their roles as Class Representatives, and Class Counsel adequately represented the Settlement Class for purposes of entering into and implementing the Amended Settlement Agreement. Accordingly, the Amended Settlement Agreement is hereby finally approved in all respects, and the Parties are hereby directed to perform its terms. The Parties and Settlement Class Members who were not excluded from the Settlement Class under Paragraph 4 above are bound by the terms and conditions of the Amended Settlement Agreement.

12. The Settlement Class described in paragraph 3 above is hereby finally certified, solely for purposes of effectuating the Settlement and this Order and Final Judgment.

13. The requirements of Rule 23(a) and (b)(3) have been satisfied for settlement purposes, for the reasons set forth herein and in the Final Approval Order (Dkt. 329). The Settlement Class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims of the Class Representatives are typical of the claims of the Settlement Class; the Class Representatives will fairly and adequately protect the interests of the class; the questions of law or fact common to class members predominate over any questions affecting only individual members; and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy between the Settlement Class Members and Defendants.

14. This Court hereby dismisses, with prejudice, without costs to any party, except as expressly provided for in the Amended Settlement Agreement, the Litigation, as defined in Section 2.27 of the Amended Settlement Agreement. This Judgment has been entered without any admission by Defendants as to the merits of any of the allegations in the Amended Consolidated Master Class Action Complaint (Dkt. 120).

15. The Parties are directed to distribute the consideration to the Settlement Class pursuant to the terms of the Amended Settlement Agreement.

16. The Court approves a fee award to Class Counsel of $15,668,265, which the Court finds to be fair and reasonable for the reasons set forth in the Final Approval Order (Dkt. 329). Defendants shall pay the fee award pursuant to and in the manner provided by the terms of the Amended Settlement Agreement.

17. The Court approves the payment of incentive awards for the Class Representatives in the amount of $5,000 each for the reasons set forth in the Final Approval Order (Dkt. 329). Defendants shall pay the incentive awards pursuant to and in the manner provided by the terms of the Amended Settlement Agreement.

18. The Plaintiffs in this Litigation and each and every one of the Settlement Class Members unconditionally, fully, and finally releases and forever discharges the Released Parties from the Released Claims. In addition, any rights of the Class Representatives and each and every one of the Settlement Class Members to the protections afforded under Section 1542 of the California Civil Code and/or any other similar, comparable, or equivalent laws, are terminated.

19. Each and every Settlement Class Member, and any person actually or purportedly acting on behalf of any Settlement Class Member(s), is hereby permanently barred and enjoined from commencing, instituting, continuing, pursuing, maintaining, prosecuting, or enforcing any

Released Claims (including, without limitation, in any individual, class or putative class, representative or other action or proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum, against the Released Parties. This permanent bar and injunction is necessary to protect and effectuate the Amended Settlement Agreement, this Order and Final Judgment, and this Court's authority to effectuate the Amended Settlement Agreement, and is ordered in aid of this Court's jurisdiction and to protect its judgments.

20. The Amended Settlement Agreement (including, without limitation, its exhibits), and any and all negotiations, documents, and discussions associated with it, shall not be deemed or construed to be an admission or evidence of any violation of any statute, law, rule, regulation or principle of common law or equity, of any liability or wrongdoing, by Defendants, or of the truth of any of the claims asserted by Plaintiffs in the Litigation, and evidence relating to the Amended Settlement Agreement shall not be discoverable or used, directly or indirectly, in any way, whether in the Litigation or in any other action or proceeding, except for purposes of enforcing the terms and conditions of the Amended Settlement Agreement, the Preliminary Approval Order, and/or this Order and Final Judgment.

21. Without affecting the finality of this Judgment, the Court, under the Court's contempt power, retains exclusive jurisdiction over this Litigation and thus all Defendants, Plaintiffs, and Settlement Class Members in this Litigation regarding the Settlement including without limitation the Amended Settlement Agreement and this Order and Final Judgment. Defendants, Plaintiffs, and Settlement Class members in this Litigation are hereby deemed to have submitted irrevocably to the exclusive jurisdiction of this Court for any suit, action, proceeding, or dispute arising out of or relating to the Released Claims, this Order and Final

Judgment, or the Amended Settlement Agreement, including but not limited to the applicability of the Released Claims, the Amended Settlement Agreement, or this Order and Final Judgment.

22. By attaching the Amended Settlement Agreement as an exhibit and incorporating its terms herein, the Court determines that this Order and Final Judgment complies in all respects with Federal Rule of Civil Procedure 65(d)(1).

23. Based upon the Court's finding that there is no just reason for delay of enforcement or appeal of this Order and Final Judgment notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Amended Settlement Agreement, the Court directs the Clerk to enter final judgment pursuant to Rule 54(b).

SO ORDERED.

Dated: February 23, 2015

James F. Holderman

JAMES F. HOLDERMAN
District Judge, United States District Court

[Exhibit – Amended Settlement Agreement]

**AMENDED SETTLEMENT AGREEMENT AND RELEASE**

This Amended Settlement Agreement and Release (the "Settlement Agreement") is entered into by and between plaintiffs Bridgett Amadeck ("Amadeck"), Tiffany Alarcon ("Alarcon"), Charles C. Patterson ("Patterson"), David Mack ("Mack"), and Andrew Kalik ("Kalik") (together, "Plaintiffs"), for themselves and the Settlement Class Members (as defined below), on the one hand, and, on the other hand, Capital One Bank (USA), N.A., Capital One, N.A., Capital One Financial Corporation, Capital One Services, LLC, Capital One Services II, LLC (together, "Capital One"), and the following vendors who made calls on behalf of Capital One: Capital Management Systems, LP ("CMS"), Leading Edge Recovery Solutions, LLC ("Leading Edge"), and AllianceOne Receivables Management, Inc. ("AllianceOne") (collectively "Participating Vendors" and, together with Capital One, "Defendants"). Plaintiffs and Defendants, the Parties to the Settlement, are referred to collectively in this Settlement Agreement as the "Parties."

## I. RECITALS

**1.01** On August 25, 2011, Nicholas Martin ("Martin") filed a class action in the Northern District of Illinois against Leading Edge Recovery Solutions, LLC ("Leading Edge"), a collection agency based in Illinois, captioned *Martin v. Leading Edge Recovery Solutions, LLC*, C.A. No. 1:11-05886 (N.D. Ill.). The complaint did not name Capital One as a defendant. Martin added Capital One as a defendant, and Mack as an additional plaintiff, on January 18, 2012 (the "*Mack* Action"). The Second Amended Complaint in the *Mack* Action alleged that Capital One and Leading Edge violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq*. (the "TCPA") by using an automatic telephone dialing system and/or an artificial prerecorded voice to call cellular telephones without the prior express consent of Mack, Martin, and the potential class members.

**1.02** On January 23, 2012, Felix Hansen ("Hansen"), Amadeck, and Albert H. Kirby ("Kirby") filed a Complaint in the United States District Court for the Western District of

Washington captioned *Amadeck et al. v. Capital One Financial Corp. and Capital One Bank (USA) NA*, Case No. 12-cv-00244 RSL (W.D. Wash.) ("*Amadeck* Action"). The Complaint in the *Amadeck* Action alleged that Capital One violated the TCPA by using an automatic telephone dialing system and/or an artificial prerecorded voice to call phones without the prior express consent of Hansen, Amadeck, Kirby, and the potential class members.

**1.03** On February 14, 2012, Patterson filed a Complaint in the United States District Court for the Northern District of Illinois captioned *Patterson v. Capital Management Services, LP*, Case No. 12-cv-01061 (N.D. Ill.) (the "*Patterson* Action"). Patterson added Capital One Bank (USA) N.A. as a defendant on February 21, 2012. The Amended Complaint in the *Patterson* Action alleged that Capital One and CMS violated the TCPA by using an automatic telephone dialing system and/or an artificial prerecorded voice to call cellular telephones without the prior express consent of Patterson and the potential class members.

**1.04** On August 7, 2012, Alarcon filed a nationwide class action in the Northern District of California captioned *Alarcon v. Cap. One Bank (USA) N.A., et al.*, Civ. No. 3:12-CV-4145 (N.D. Cal.) (the "*Alarcon* Action"). The Complaint in the *Alarcon* Action alleged that Capital One violated the TCPA by using an automatic telephone dialing system and/or an artificial prerecorded voice to call cellular telephones without the prior express consent of Alarcon and the potential class members. Alarcon voluntarily dismissed this lawsuit on October 1, 2012.

**1.05** On December 10, 2012, the Joint Panel on Multidistrict Litigation ("JPML") transferred the *Mack*, *Amadeck*, and *Patterson* class actions and related individual actions involving TCPA allegations to the Northern District of Illinois. Plaintiffs filed a Consolidated Master Class Action Complaint ("Master Complaint") on February 28, 2013 against Capital One, Leading Edge, and CMS. *See In re Capital One Telephone Consumer Protection Act Litigation*, MDL No. 2416, Master Docket No. 1:12-cv-10064, Dkt. 19. The Master Complaint superseded the complaints filed in the *Mack*, *Amadeck*, and *Patterson* class actions, and was amended on June 13, 2014. *Id.*, Dkt. 120.

**1.06** Capital One, CMS, AllianceOne, and Leading Edge deny all material allegations contained in the Master Complaint. Defendants specifically deny that they used automated dialers or prerecorded voice messages to call Plaintiffs or potential class members without their prior express consent; that they violated the TCPA; and that Plaintiffs and potential class members are entitled to any relief. Defendants further contend that the allegations contained in the Master Complaint are not amenable to class certification. Nevertheless, given the risks, uncertainties, burden, and expense of continued litigation, Defendants have agreed to settle all claims alleged in the Master Complaint on the terms set forth in this Agreement, subject to Court approval.

**1.07** This Settlement Agreement resulted from good faith, arm's-length settlement negotiations over many months, including three in-person and two telephonic mediation sessions before the Honorable Edward A. Infante (Ret.) of JAMS. Plaintiffs, Capital One, and Leading Edge submitted detailed mediation submissions to Judge Infante setting forth their respective views as to the strengths of their cases. Additionally, Plaintiffs have reviewed reasonably accessible data that Defendants have produced and have confirmed the number of persons in the Settlement Class. Capital One has also provided information confirming the business practice changes that it has developed and implemented, including significant enhancements to its calling systems designed to prevent the calling of a cellular telephone with an autodialer unless the recipient of the call has provided prior express consent. These practice changes constitute the Settlement's core relief.

**1.08** The Parties understand, acknowledge, and agree that the execution of this Settlement Agreement constitutes the settlement and compromise of disputed claims. This Settlement Agreement is inadmissible as evidence against any of the Parties except to enforce the terms of the Settlement Agreement and is not an admission of wrongdoing or liability on the part of any Party to this Settlement Agreement. The Parties desire and intend to effect a full, complete and final settlement and resolution of all existing disputes and claims as set forth herein.

**1.09** The Settlement contemplated by this Settlement Agreement is subject to preliminary approval and final approval by the Court, as set forth herein. This Settlement Agreement is intended by the Parties to fully, finally and forever resolve, discharge and settle the Released Claims, upon and subject to the terms and conditions hereof.

## II. DEFINITIONS

**2.01** "Agreement" or "Settlement Agreement" means this Settlement Agreement and Release between Plaintiffs and Defendants and each and every exhibit attached hereto.

**2.02** "Approved Claims" means claims made by Settlement Class Members that have been timely submitted and approved for payment.

**2.03** "Capital One" refers collectively to Capital One Bank (USA), N.A., Capital One, N.A.; Capital One Financial Corporation; Capital One Services, LLC; and Capital One Services II, LLC.

**2.04** "CAFA Notice" refers to the notice pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715(b) to be provided by the Claims Administrator pursuant to Section 8.06.

**2.05** "Call" means voice calls but not texts.

**2.06** "Cash Award" means a cash payment from the Settlement Fund to an eligible Settlement Class Member.

**2.07** "Claims Administration" means the activities of the Claims Administrator consistent with the terms of this Settlement.

**2.08** "Claims Administrator" means BrownGreer PLC.

**2.09** "Claim Form" means one of the claim forms to be submitted by Settlement Class members in substantially the form attached hereto as Exhibits A and B2.

**2.10** "Claims Deadline" means ninety (90) calendar days after the Settlement Notice Date.

**2.11** "Claims Period" means the 90-day period that begins on the Settlement Notice Date.

**2.12** "Class Counsel" means and includes:

a. Mack's Counsel, as follows: Burke Law Offices, LLC

b. Amadeck's Counsel, as follows: Williamson & Williams, and Terrell Marshall Daudt & Willie PLLC;

c. Patterson's Counsel, as follows: Keogh Law, Ltd.;

d. Alarcon's Counsel, as follows: Lieff Cabraser Heimann & Bernstein, LLP, and Meyer Wilson Co., LPA; and

e. Kalik's counsel, as follows: Williamson & Williams, and Terrell Marshall Daudt & Willie PLLC.

**2.13** "Class Notice" means any type of notice that has been or will be provided to the Settlement Class pursuant to this Agreement and any additional notice that might be ordered by the Court.

**2.14** "Class Period" has the following meanings:

a. "Capital One Class Period" means from January 18, 2008, through June 30, 2014;

b. "Participating Vendor Class Period" means from February 28, 2009, through June 30, 2014.

**2.15** "Class Representatives" means Plaintiffs Mack, Amadeck, Patterson, Kalik, and Alarcon.

**2.16** "Court" means the United States District Court for the Northern District of Illinois, and U.S. District Judge James F. Holderman, Jr., to whom the *Mack, Amadeck*, and *Patterson* Actions were transferred by the JPML on December 10, 2012, MDL No. 2416, Master Case No. 1:12-cv-10064, and before whom the Consolidated Master Class Action Complaint (Dkt. 19) was filed on February 28, 2013, and was amended on June 13, 2014 (Dkt. 120).

**2.17** "Credit Card Account" means any revolving line of credit that requires payment of an amount due by a due date regardless of whether used for consumer or business purposes or if accessed by a card or other access device. Credit Card Account does not include any

residential mortgage loan account, any revolving line of credit secured by real property, or any savings account, checking account, installment loan account, student loan account, or auto loan account.

**2.18** "Cy Pres Distribution" means monies that may be distributed in connection with the Settlement, pursuant to Section 7.04.f.

**2.19** "Effective Date" means the date when the Judgment has become final as provided in Section 12.

**2.20** "Fairness Hearing" means the hearing held by the Court to determine whether to finally approve the Settlement set forth in this Settlement Agreement as fair, reasonable, and adequate, also referred to herein as the "Final Approval Hearing."

**2.21** "FCC" means the Federal Communications Commission.

**2.22** "Final Approval Hearing" means the hearing held by the Court to determine whether to finally approve the Settlement set forth in this Settlement Agreement as fair, reasonable, and adequate, sometimes referred to herein as the "Fairness Hearing."

**2.23** "Final Approval Order" means the order to be submitted to the Court in connection with the Final Approval Hearing, substantially in the form attached hereto as Exhibit C.

**2.24** "Final Distribution Date" means the earlier of (i) the date as of which all the checks for Cash Awards have been cashed, or (ii) 210 calendar days after the date on which the last check for a Cash Award was issued.

**2.25** "Funding Date" means five (5) business days after the Effective Date.

**2.26** "Lead Class Counsel" means and includes: Lieff Cabraser Heimann & Bernstein, LLP, and Terrell Marshall Daudt & Willie PLLC, as designated by the Court.

**2.27** "This Litigation" means the action described by the Consolidated Master Class Action Complaint filed in the Northern District of Illinois on February 28, 2013, as amended by the Amended Consolidated Master Class Action Complaint. *See In re Capital One Telephone Consumer Protection Act Litigation*, MDL No. 2416, Master Case No. 1:12-cv-10064, Dkts. 19,

120.

**2.28** "Master Complaint" means the Consolidated Master Class Action Complaint filed in the Northern District of Illinois on February 28, 2013, as amended on June 13, 2014. *See In re Capital One Telephone Consumer Protection Act Litigation*, MDL No. 2416, Master Case No. 1:12-cv-10064, Dkts. 19, 120.

**2.29** "Notice" means the notices to be provided to Settlement Class Members as set forth in Section 8 including, without limitation, Email Notice, Mail Notice, Publication Notice, and Internet Notice. The forms of the Email Notice, Mail Notice, Publication Notice, and Internet Notice are attached hereto collectively as Exhibit B.

**2.30** "Notice Databases" means the databases containing Settlement Class Members' information Defendants have provided pursuant to Section 7.02.

**2.31** "Objection Deadline" means sixty (60) calendar days after the Settlement Notice Date.

**2.32** "Opt-Out Deadline" means sixty (60) calendar days after the Settlement Notice Date.

**2.33** "Participating Vendor" means the three Capital One calling vendors who have agreed to participate in the Settlement: CMS, Leading Edge, and AllianceOne.

**2.34** "Preliminary Approval Order" means the proposed order to be submitted to the Court in connection with Motion for Preliminary Approval, in the form attached hereto as Exhibit D.

**2.35** "Released Claims" means the claims released in Section 14.

**2.36** "Released Parties" means (1) Capital One Bank (USA) N.A., Capital One, N.A., Capital One Financial Corporation, Capital One Services, LLC, Capital One Services II, LLC, and each of their respective past, present, and future parents, subsidiaries, affiliated companies and corporations, and each of their respective past, present, and future directors, officers, managers, employees, general partners, limited partners, principals, agents, insurers, reinsurers, shareholders, attorneys, advisors, representatives, predecessors, successors, divisions, joint

ventures, assigns, or related entities, and each of their respective executors, successors, assigns, and legal representatives; (2) Leading Edge Recovery Solutions, LLC, and each of its respective past, present, and future parents, subsidiaries, affiliated companies and corporations, and each of their respective past, present, and future directors, officers, managers, employees, general partners, limited partners, principals, agents, insurers, reinsurers, shareholders, attorneys, advisors, representatives, predecessors, successors, divisions, joint ventures, assigns, or related entities, and each of their respective executors, successors, assigns, and legal representatives; (3) Capital Management Systems LP, each of its respective past, present, and future parents, subsidiaries, affiliated companies and corporations, and each of their respective past, present, and future directors, officers, managers, employees, general partners, limited partners, principals, agents, insurers, reinsurers, shareholders, attorneys, advisors, representatives, predecessors, successors, divisions, joint ventures, assigns, or related entities, and each of their respective executors, successors, assigns, and legal representatives; (4) AllianceOne Receivables Management, Inc., and each of its respective past, present, and future parents, subsidiaries, affiliated companies and corporations, and each of their respective past, present, and future directors, officers, managers, employees, general partners, limited partners, principals, agents, insurers, reinsurers, shareholders, attorneys, advisors, representatives, predecessors, successors, divisions, joint ventures, assigns, or related entities, and each of their respective executors, successors, assigns, and legal representatives. "Released Parties" specifically includes all corporate affiliates of Capital One, Leading Edge, CMS, and AllianceOne, respectively, that are related to Capital One's credit-card lines of business. It also includes all entities with which Capital One contracts to obtain representatives to place calls using Capital One's dialers.

**2.37** "Request for Exclusion" means the written submission submitted by a Settlement Class Member to opt out of the Settlement consistent with the terms of this Agreement.

**2.38** "Settlement" means the Settlement set forth in this Agreement between Plaintiffs and Defendants and each and every exhibit attached hereto.

**2.39** "Settlement Class" means and includes all persons within the United States who

received a non-emergency telephone call from Capital One's dialer(s) to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from January 18, 2008, through June 30, 2014; and all persons within the United States who received a non-emergency telephone call from a Participating Vendor's dialer(s) made on behalf of Capital One to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from February 28, 2009, through June 30, 2014.

**2.40** "Settlement Class Members" means the Plaintiffs and those persons who are members of the Settlement Class, as set forth in the Settlement Class as defined above, and who do not submit a timely and valid Request for Exclusion from the Settlement Class.

**2.41** "Settlement Costs" means all costs incurred by the Settlement Class and their attorneys, including but not limited to Plaintiffs' attorneys' fees, their costs of suit, Plaintiffs' expert or consultant fees, any incentive payments paid to the Class Representatives, notice costs, costs of Claims Administration, and all other costs of administering the settlement.

**2.42** "Settlement Fund" means the $75,455,098.74 fund consisting of (1) the non-reversionary cash sum that Capital One will pay to settle this Litigation and obtain a release of all Released Claims in favor of all Capital One Released Parties, in the amount of $73,000,000; (2) the non-reversionary cash sum that Leading Edge will pay to settle this Litigation and obtain a release of all Released Claims in favor of Leading Edge and Capital One Released Parties, in the amount of $996,205.71; (3) the non-reversionary cash sum that CMS will pay to settle this Litigation and obtain a release of all Released Claims in favor of CMS and Capital One Released Parties, in the amount of $24,220.08; and (4) the non-reversionary cash sum that AllianceOne will pay to settle this Litigation and obtain a release of all Released Claims in favor of AllianceOne and Capital One Released Parties, in the amount of $1,434,672.95.

**2.43** "Settlement Notice Date" means thirty (30) calendar days after the Preliminary Approval Order is issued.

**2.44** "Settlement Website" means the Internet website operated by the Claims Administrator as described in Section 8.04.

**2.45** "TCPA" means the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*, and any regulations or rulings promulgated under it.

## III. ALL PARTIES RECOMMEND APPROVAL OF THE SETTLEMENT

**3.01** Defendants' Position on the Conditional Certification of Settlement Class. Defendants dispute that a class would be manageable and further deny that a litigation class properly could be certified on the claims asserted in this Litigation. However, solely for purposes of avoiding the expense and inconvenience of further litigation, Defendants do not oppose the certification of the Settlement Class for the purposes of only this Settlement. Preliminary certification of the Settlement Class will not be deemed a concession that certification of a litigation class is appropriate, nor would Defendants be precluded from challenging class certification in further proceedings in this Litigation or in any other action if the Settlement Agreement is not finalized or finally approved. If the Settlement Agreement is not finally approved by the Court for any reason whatsoever, the certification of the Settlement Class will be void, and no doctrine of waiver, estoppel, or preclusion will be asserted in any litigated certification proceedings in this Litigation or any other judicial proceeding. No agreements made by or entered into by Defendants in connection with the Settlement Agreement may be used by Plaintiffs, any Settlement Class Member, or any other person to establish any of the elements of class certification in any litigated certification proceedings, whether in this Litigation or any other judicial proceeding.

**3.02** Plaintiffs' Belief in the Merits of Case. Plaintiffs believe that the claims asserted in this Litigation have merit and that the evidence developed to date supports those claims. This Settlement will in no event be construed or deemed to be evidence of or an admission or concession on the part of Plaintiffs that there is any infirmity in the claims asserted by Plaintiffs, or that there is any merit whatsoever to any of the contentions and defenses that Defendants have

asserted.

**3.03** Plaintiffs Recognize the Benefits of Settlement. Plaintiffs recognize and acknowledge, however, the expense and amount of time which would be required to continue to pursue this Litigation against Defendants, as well as the uncertainty, risk, and difficulties of proof inherent in prosecuting such claims on behalf of the Settlement Class. Plaintiffs have concluded that it is desirable that this Litigation and any Released Claims be fully and finally settled and released as set forth in this Settlement. Plaintiffs and Class Counsel believe that the Settlement set forth in this Agreement confers substantial benefits upon the Settlement Class and that it is in the best interests of the Settlement Class to settle as described herein.

## IV. SETTLEMENT TERMS AND BENEFITS TO THE SETTLEMENT CLASS

**4.01** Changes in Capital One's Business Practices. The Parties agree that the core relief under the Settlement is Capital One's business practice changes. As a benefit to all Settlement Class Members, Capital One has developed and implemented significant enhancements to its calling systems designed to prevent the calling of a cellular telephone with an autodialer unless the recipient of the call has provided prior express consent. To the extent that Congress, the FCC, or any other relevant federal regulatory authority promulgates different requirements under the TCPA, 47 U.S.C. § 227, *et seq.*, or any other law or regulatory promulgation that would govern any conduct affected by the Settlement, those laws and regulatory provisions will control with respect to Capital One's business practice changes.

**4.02** Monetary Consideration. In addition to the business practice changes set forth in Section 4.01, (1) Capital One will pay a non-reversionary cash sum in the amount of $73,000,000 into the Settlement Fund; (2) Leading Edge will pay a non-reversionary cash sum in the amount of $996,205.71 into the Settlement Fund; (3) Capital Management will pay a non-reversionary cash sum in the amount of $24,220.08 into the Settlement Fund; and (4) AllianceOne will pay a non-reversionary cash sum in the amount of $1,434,672.95 into the Settlement Fund. These amounts will be paid by Defendants to the Claims Administrator on the

Funding Date.

**4.03** Eligibility for Cash Awards. Cash Awards will be made to eligible Settlement Class Members on a claims-made basis. Each Settlement Class Member will be entitled to make one claim for a Cash Award regardless of the number of accounts the Settlement Class Member had, the number of times the Settlement Class Member was called, the number of cellular numbers at which the Settlement Class Member was called, and whether the Settlement Class Member was called by Capital One or a Participating Vendor.

**4.04** Amount Paid per Claim. Each Settlement Class Member who makes a valid and timely claim will receive a Cash Award. The amount of each Cash Award will be determined by the following formula: (Total Settlement Fund – Settlement Costs) ÷ (Total Number of Approved Claims) = Cash Award. Therefore, the Cash Award for each Settlement Class Member who makes a valid and timely claim is the Settlement Class Member's pro rata share of the total payments to Settlement Class Members from the Settlement Fund.

## V. ATTORNEYS' FEES, COSTS AND PAYMENT TO CLASS REPRESENTATIVES

**5.01** Attorneys' Fees and Costs. Class Counsel will move the Court for an award of attorneys' fees and expenses to be paid from the Settlement Fund. Defendants will not object to any request by Class Counsel for attorneys' fees in an amount not exceeding 30% (thirty percent) of the Settlement Fund, nor object to any amounts sought for the costs incurred by Class Counsel in representing the named Plaintiffs and the Settlement Class Members in the Litigation. Class Counsel will be entitled to payment of the fees awarded by the Court out of the Settlement Fund no later than the Effective Date.

**5.02** Payment to Class Representatives. The Class Representatives will ask the Court to award them incentive payments for the time and effort they have personally invested in the Litigation. Defendants will not object to such incentive payments to be paid to Mack, Amadeck, Kalik, Patterson, and Alarcon from the Settlement Fund provided they do not exceed $25,000 in the aggregate (or $5,000 for each Class Representative), subject to Court approval. Within five

(5) business days after the Funding Date, and after receiving W-9 forms from the Class Representatives, the Claims Administrator will pay to Class Counsel the amount of incentive payments awarded by the Court, and Class Counsel will disburse such funds to the Class Representatives.

**5.03** Settlement Independent of Award of Fees, Costs and Incentive Payments. The payments of attorneys' fees, costs, and incentive payments set forth in Sections 5.01 and 5.02 are subject to and dependent upon the Court's approval as fair, reasonable, adequate, and in the best interests of Settlement Class Members. However, this Settlement is not dependent or conditioned upon the Court's approving Plaintiffs' requests for such payments or awarding the particular amounts sought by Plaintiffs. In the event the Court declines Plaintiffs' requests or awards less than the amounts sought, this Settlement will continue to be effective and enforceable by the Parties.

## VI. PRELIMINARY APPROVAL

**6.01** Order of Preliminary Approval. As soon as practicable after the execution of this Agreement, Plaintiffs will move the Court for entry of the Preliminary Approval Order in substantially the form attached as Exhibit D. Pursuant to the motion for preliminary approval, the Plaintiffs will request that:

a. the Court conditionally certify the Settlement Class for purposes of this Settlement only and appoint Class Counsel as counsel for the Class for settlement purposes only;

b. the Court preliminarily approve the Settlement and this Agreement as fair, adequate, and reasonable, and within the reasonable range of possible final approval;

c. the Court approve the forms of Notice and find that the notice program set forth herein constitutes the best notice practicable under the circumstances, and satisfies due process and Rule 23 of the Federal Rules of Civil Procedure;

d. the Court set the date and time for the Final Approval Hearing, which may be continued by the Court from time to time without the necessity of further notice; and,

e. the Court set the Claims Deadline, the Objection Deadline, and the Opt-Out Deadline.

## VII. ADMINISTRATION AND NOTIFICATION PROCESS

**7.01** Third-Party Claims Administrator. The Claims Administrator will be responsible for all matters relating to the administration of this Settlement, as set forth herein. Those responsibilities include, but are not limited to, giving notice, obtaining new addresses for returned email and mail, setting up and maintaining the Settlement Website and toll-free telephone number, fielding inquiries about the Settlement, processing claims, acting as a liaison between Settlement Class Members and the Parties regarding claims information, approving claims, rejecting any Claim Form where there is evidence of fraud (as determined by the Claims Administrator under policies and procedures developed by the Claims Administrator and approved by the Parties), directing the mailing of Cash Awards to Settlement Class Members, and any other tasks reasonably required to effectuate the foregoing. The Claims Administrator will provide monthly updates on the claims status to counsel for all Parties.

**7.02** Notice Databases. To facilitate the notice and claims administration process, Defendants have provided to the Claims Administrator, in an electronically searchable and readable format, Notice Databases which include the names, last known email address, last known mailing addresses, truncated account numbers, and cellular telephone numbers called for all known members of the Settlement Class, as such information is contained in Defendants' reasonably available computerized account records. Defendants represent for settlement purposes that the size of the Settlement Class is comprised of people throughout the United States who possess approximately 21.2 million unique cellular telephone numbers. If any of the terms of this Settlement relating to the Claims Administrator's services would unreasonably hinder or delay such processes or make them more costly, the Claims Administrator will so advise the Parties, and the Parties will accommodate the Claims Administrator to the extent necessary to carry out the intent of this Settlement Agreement. Any personal information relating

to members of the Settlement Class provided to the Claims Administrator or Class Counsel pursuant to this Settlement will be provided solely for the purpose of providing notice to members of the Settlement Class and allowing them to recover under this Settlement; will be kept in strict confidence; will not be disclosed to any third party; and will not be used for any other purpose. The Claims Administrator shall return the Notice Databases to Capital One and the relevant Participating Vendors within ninety (90) days after the Effective Date.

**7.03** Payment of Notice and Claims Administration Costs. Capital One will pay the reasonable costs of notice and Claims Administration that are incurred prior to the creation of the Settlement Fund, and Capital One will be given credit for all such payments which will be deducted from the Settlement Fund as set forth below. The Claims Administrator will provide to the Parties an estimate of the amount of costs required to email and mail Notice, establish the Settlement Website, and establish a toll-free telephone number, as well as any other initial administration costs to the Parties. Capital One will pay the estimated amount to the Claims Administrator within ten (10) business days after the entry of the Preliminary Approval Order. After that upfront payment of administration costs by Capital One, the Claims Administrator will bill Capital One monthly for the reasonable additional costs of Claims Administration, until such time as the Settlement Fund is established. Any amounts paid by Defendant for the estimated costs of Claims Administration which are not incurred by the Claims Administrator will be used for other Claims Administration costs, or will be deducted from future billings by the Claims Administrator. The Claims Administrator will maintain detailed records of the amounts spent on the administration of the Settlement and will provide those to the Parties monthly. At such time that Capital One funds the Settlement Fund, all amounts previously paid to the Claims Administrator by Capital One will be deducted from the total payment which Capital One is required to pay to create the Settlement Fund. After Capital One has created the Settlement Fund, Capital One will have no further obligation to pay any amount under this Settlement Agreement, and any additional Settlement Costs will be paid out of the Settlement Fund.

**7.04** Distribution of the Settlement Fund. The Claims Administrator will distribute the

funds in the Settlement Fund in the following order and within the time period set forth with respect to each such payment:

a. first, the Claims Administrator will pay to Class Counsel the attorneys' fees, costs, and expenses ordered by the Court as set forth in Section 5.01;

b. next, no later than five (5) business days after the Funding Date, the Claims Administrator will pay to the Class Representatives any incentive award ordered by the Court, as described in Section 5.02;

c. next, no later than fifteen (15) calendar days after the Funding Date, the Claims Administrator will be paid for any unreimbursed costs of administration;

d. next, no later than twenty-five (25) calendar days after the Funding Date, the Claims Administrator will pay the Cash Awards to eligible Settlement Class Members pursuant to Section 9;

e. next, if checks that remain uncashed after 210 calendar days after the first pro rata distribution yield an amount that, after administration costs, would allow a second pro rata distribution to the qualifying Settlement Class Members equal to or greater than $1.00 per Settlement Class Member, the Claims Administrator will distribute any such funds on a pro rata basis to Settlement Class Members who cashed settlement checks.

f. next, if a second pro rata distribution is not made, the uncashed amount will be paid to a non-profit(s) to be determined. If, for any reason, the Parties determine that the proposed recipient is no longer an appropriate recipient, or the Parties no longer agree on the proposed recipient, or the Court determines that the proposed recipient is not or is no longer an appropriate recipient, the Parties will agree on a replacement recipient of such monies, subject to Court approval.

g. Finally, if a second pro rata distribution is made, the amount of any checks that remain uncashed 210 calendar days after that distribution will be distributed to the non-profits(s) indicated in Section 7.04.f. Upon request by a Settlement Class Member, the Claims Administrator may re-issue settlement checks, provided that such re-issued checks will not be

negotiable beyond the date that is one hundred eighty (180) calendar days after the date of issuance of the original check to such Settlement Class Member.

## VII. NOTICES

**8.01** Timing of Class Notice. Class Notice will be provided to all persons in the Settlement Class within thirty (30) calendar days following entry of the Preliminary Approval Order as described herein.

**8.02** E-Mailing or Mailing of Settlement Notice. The Claims Administrator will send the Settlement Notice via: (i) electronic mail, to the most recent email address as reflected in Capital One's reasonably available computerized account records, to all persons in the Settlement Class for whom such records exist and who have not opted out of receiving electronic mail from Capital One, in accordance with Capital One's currently existing email opt-out policies; or (ii) first class mail, to the most recent mailing address as reflected in Capital One's reasonably available computerized account records, for those persons in the Settlement Class for whom Capital One does not have an email address (as reflected in reasonably available computerized account records) and/or who have opted out of receiving emails from Capital One, in accordance with Capital One's currently existing email opt-out policies, and to those persons in the Settlement Class whose emails are undeliverable.

a. Address Confirmation. The last known address of persons in the Settlement Class will be subject to confirmation or updating as follows: (a) the Claims Administrator will check each address against the United States Post Office National Change of Address Database before the initial mailing; (b) the Claims Administrator will conduct a reasonable search to locate an updated address for any person in the Settlement Class whose Settlement Notice is returned as undeliverable; (c) the Claims Administrator will update addresses based on any forwarding information received from the United States Post Office; and, (d) the Claims Administrator will update addresses based on any requests received from persons in the Settlement Class.

b. Re-Mailing of Returned Settlement Notices. The Claims Administrator will promptly re-mail any Notices that are returned as non-deliverable with a forwarding address to such forwarding address. For all returned mail, the Claims Administrator will perform data searches and other reasonable steps to attempt to obtain better contact information on the Settlement Class Member. All costs of such research will be considered Settlement Costs and deducted from the Settlement Fund.

c. Costs Considered Settlement Costs. All costs of address confirmation, data searches, and re-mailing of Returned Settlement Notices will be considered Settlement Costs and deducted from the Settlement Fund.

**8.03** Publication Notice. The Claims Administrator will design and conduct a nationwide publication website-based notice program which the Parties and the Claims Administrator believe will fully satisfy the requirements of due process. The nationwide publication website-based notice program will be agreed to by the Parties and submitted to the Court on or before July 29, 2014. The nationwide publication website-based notice program will be initiated on the Settlement Notice Date. The Publication Notice will be published on the Settlement Website on the same date, and retained on the website thereafter.

**8.04** Internet Notice. By the Settlement Notice Date, the Claims Administrator will maintain and administer a dedicated settlement Website (www.CapitalOneTCPAsettlement.com) containing class information and related documents, along with information necessary to file a claim, and an electronic version of the Claim Form members can download, complete, and submit electronically. At a minimum, such documents will include the Settlement Agreement and attached exhibits, E-mail Notice, Mail Notice, a downloadable Claim Form for anyone wanting to print a hard copy and mail in the Claim Form, and when filed, the Preliminary Approval Order and the Final Approval Order. The Website will be taken down and rendered inaccessible by 240 calendar days after the first pro rata distribution.

**8.05** Toll-Free Telephone Number. Within ten (10) business days of the issuance of the Preliminary Approval Order, the Claims Administrator will set up a toll-free telephone

number for receiving toll-free calls related to the Settlement. That telephone number will be maintained until thirty (30) calendar days after the Claims Deadline. After that time, and for a period of ninety (90) calendar days thereafter, a recording will advise any caller to the toll-free telephone number that the Claims Deadline has passed and the details regarding the Settlement may be reviewed on the related Settlement Website.

**8.06** CAFA Notice. The Claims Administrator will be responsible for serving the required CAFA Notice within ten (10) calendar days after the filing of the Preliminary Approval Motion.

## IX. CLAIMS PROCESS

**9.01** Potential Claimants. Each member of the Settlement Class who does not timely and validly request exclusion from the Settlement as required in this Agreement will be a Settlement Class Member and entitled to make a claim. Each Settlement Class Member will be entitled to make a single claim for one call regardless of the number of accounts the Settlement Class Member had, the number of times the Settlement Class Member was called, or the number of cellular numbers at which the Settlement Class Member was called.

**9.02** Conditions for Claiming Cash Award. To make a claim, a Settlement Class Member must submit by the Claims Deadline a valid and timely Claim Form, which, depending on the method of filing a claim, will contain the information set forth in either Exhibit A or Exhibit B2 attached hereto. If a Settlement Class Member fails to fully complete a Claim Form, the Claim Form will be invalid. Any Settlement Class Member who has submitted or submits an incomplete or inaccurate Claim Form will be permitted to re-submit a Claim Form within thirty-five (35) calendar days after the sending of notice of the defect by the Claims Administrator. Class Counsel will be kept apprised of the volume and nature of defective claims and allowed to communicate with Settlement Class Members as they deem appropriate to cure such deficiencies.

**9.03** Mailing of Settlement Checks. Settlement checks will be sent to qualified

Settlement Class Members by the Claims Administrator via U.S. mail no later than twenty-five (25) calendar days after the Funding Date. If any settlement checks are returned, the Claims Administrator will attempt to obtain a new mailing address for that Settlement Class Member by taking the steps described in Section 8.02. If, after a second mailing, the settlement check is again returned, no further efforts need be taken by the Claims Administrator to resend the check. The Claims Administrator will advise Class Counsel and counsel for Defendants of the names of the Settlement Class Members whose checks are returned by the postal service as soon as practicable. Each settlement check will be negotiable for one hundred eighty (180) calendar days after it is issued. If checks that remain uncashed after two hundred ten (210) calendar days after the first pro rata distribution yield an amount that, after administration costs, would allow a second pro rata distribution to the qualifying Settlement Class Members equal to or greater than $1.00 per qualifying Settlement Class Member, a second pro rata distribution will be made. If a second pro rata distribution is made, the amount of any checks that remain uncashed after two hundred ten (210) calendar days after that second distribution will be distributed to the non-profit(s) indicated in Section 7.04.f. Upon request by a claimant, the Claims Administrator may re-issue settlement checks, provided that such re-issued checks will not be negotiable beyond that date that is one hundred eighty (180) calendar days after the date of issuance of the original check to such claimant.

## X. OPT-OUTS AND OBJECTIONS

**10.01** Opting Out of the Settlement. Any members of the Settlement Class who wish to exclude themselves from the Settlement Class must advise the Claims Administrator by providing a written Request for Exclusion, and their opt out request must be postmarked no later than the Opt-Out Deadline.

**10.02** Deadline. The Claims Administrator will provide the Parties with copies of each Request for Exclusion it receives, and will provide a list of each Settlement Class Member who timely and validly opted out of the Settlement in its declaration filed with the Court, as required

by Section 11.01. Settlement Class Members who do not properly and timely submit a Request for Exclusion will be bound by this Agreement and the Judgment, including the releases in Section 14 below.

a. In the Request for Exclusion, the Settlement Class Member must state his or her full name, address, and cellular telephone number(s) at which the Settlement Class Member alleges he or she received a call from one of the Defendants, and must state that he or she wishes to be excluded from the Settlement.

b. Any member of the Settlement Class who submits a valid and timely Request for Exclusion will not be a Settlement Class Member and will not be bound by the terms of this Agreement.

**10.03** Objections. Any Settlement Class Member who intends to object to the fairness of this Settlement must file a written Objection with the Court by the Objection Deadline.

a. In the written Objection, the Settlement Class Member must state his or her full name, address, and cellular telephone number(s) that the Settlement Class Member alleges received a call from one of the Defendants, and must state the reasons for his or her Objection, and whether he or she intends to appear at the Fairness Hearing on his or her own behalf or through counsel. Any documents supporting the Objection must also be attached to the Objection.

b. The Parties will have the right to depose any objector to assess whether the objector has standing.

**10.04** Fairness Hearing. Any Settlement Class Member who has timely filed an Objection may appear at the Fairness Hearing, either in person or through an attorney hired at the Settlement Class Member's own expense, to object to the fairness, reasonableness, or adequacy of this Agreement or the Settlement.

## XI. FINAL APPROVAL AND JUDGMENT ORDER

**11.01** No later than fourteen (14) calendar days prior to the Final Approval Hearing, the

Claims Administrator will file with the Court and serve on counsel for all Parties a declaration stating that the Notice required by the Agreement has been completed in accordance with the terms of the Preliminary Approval Order.

**11.02** If the Court issues the Preliminary Approval Order, and all other conditions precedent to the Settlement have been satisfied, no later than fourteen (14) calendar days prior to Final Approval Hearing:

a. All Parties will request, individually or collectively, that the Court enter the Final Approval Order in substantially the form attached as Exhibit C, with Class Counsel filing a memorandum of points and authorities in support of the motion; and,

b. Class Counsel and/or Defendants may file a memorandum addressing any Objections submitted to the Settlement.

**11.03** At the Final Approval Hearing, the Court will consider and determine whether the provisions of this Agreement should be approved, whether the Settlement should be finally approved as fair, reasonable, and adequate, whether any Objections to the Settlement should be overruled, whether the fee award and incentive payments to the Class Representatives should be approved, and whether a Judgment finally approving the Settlement should be entered.

**11.04** This Agreement is subject to and conditioned upon the issuance by the Court of a Final Approval Order which grants final approval of this Agreement and enters a final Judgment and:

a. finds that the Notice provided satisfies the requirements of due process and Federal Rules of Civil Procedure Rule 23(e)(1);

b. finds that Settlement Class Members have been adequately represented by the Class Representatives and Class Counsel;

c. finds that the Settlement Agreement is fair, reasonable, and adequate with respect to the Settlement Class, that each Settlement Class Member will be bound by this Agreement, including the releases in Sections 14.01 and 14.02, and the covenant not to sue in Section 14.04, and that this Settlement Agreement should be and is approved;

d. dismisses on the merits and with prejudice all claims of the Settlement Class Members asserted in the Litigation;

e. permanently enjoins each and every Settlement Class Member from bringing, joining, or continuing to prosecute any Released Claims against any of the Defendants or the Released Parties; and,

f. retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation, and enforcement of this Settlement Agreement.

## XII. FINAL JUDGMENT

**12.01** The judgment entered at the Final Approval Hearing will be deemed final:

a. Thirty (30) calendar days after entry of the Judgment approving the Settlement if no document is filed within that time seeking appeal, review, or rehearing of the Judgment; or

b. If any such document is filed, then five (5) business days after the date upon which all appellate and/or other proceedings resulting from such document have been finally terminated in such a manner as to permit the Judgment to take effect in substantially the form described in Section 11.04.

## XIII. CONFIRMATORY DISCOVERY

**13.01** Class Counsel hereby represent that they have conducted discovery to confirm the accuracy of the information provided to them during the course of the Litigation and the Parties' settlement negotiations. The purpose of that discovery was to confirm: (a) the total number of Settlement Class Members, i.e., those persons who were actually called by Capital One or by the Participating Vendors on cellular telephone numbers during the Class Period in connection with Capital One's Credit Card Accounts, and the process used to determine that number; (b) changes to Capital One's business practices as described in Section 4.01; and (c) to ascertain and evaluate the class claims and potential obstacles to certification as well as other factors relevant to the Settlement. This discovery is to be used solely for purposes of this Settlement and, consistent

with Sections 16.01 and 16.02 below, may not be used for any purpose in the event this Agreement is terminated or is not fully and finally approved by the Court.

## XIV. RELEASE OF CLAIMS

**14.01** Released Claims. Plaintiffs and each Settlement Class Member, as well as their respective assigns, heirs, executors, administrators, successors, and agents, hereby release, resolve, relinquish, and discharge each and all of the Released Parties from each of the Released Claims (as defined below). The Plaintiffs and the Settlement Class Members further agree that they will not institute any action or cause of action (in law, in equity or administratively), suits, debts, liens, or claims, known or unknown, fixed or contingent, which they may have or claim to have, in state or federal court, in arbitration, or with any state, federal or local government agency or with any administrative or advisory body, arising from or reasonably related to the Released Claims. The release does not apply to members of the Settlement Class who opt out of the Settlement by submitting a valid and timely Request for Exclusion. "Released Claims" means any and all claims, causes of action, suits, obligations, debts, demands, agreements, promises, liabilities, damages, losses, controversies, costs, expenses, and attorneys' fees of any nature whatsoever, whether based on any federal law, state law, common law, territorial law, foreign law, contract, rule, regulation, any regulatory promulgation (including, but not limited to, any opinion or declaratory ruling), common law, or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, punitive or compensatory, as of the date of the Final Approval Order, that arise out of or relate in any way to: (i) Capital One's use of an "automatic telephone dialing system" or "artificial or prerecorded voice" to contact or attempt to contact Settlement Class Members in connection with Capital One's Credit Card Accounts via Calls, as defined above, from January 18, 2008, to June 30, 2014, and/or (ii) any Participating Vendor's use of an "automatic telephone dialing system" or "artificial or prerecorded voice" to contact or attempt to contact Settlement Class Members in connection with Capital One's Credit Card Accounts via Calls, as defined

above, from February 28, 2009, to June 30, 2014. Released Claims include the claims of Capital One Credit Card Account holders and non-account holders who are members of the Settlement Class. Released Claims include all TCPA claims and all state law claims arising out of the same Calls to cellular telephones as the TCPA claims.

**14.02** Waiver of Unknown Claims. Without limiting the foregoing, the Released Claims specifically extend to claims that Plaintiffs and Settlement Class Members do not know or suspect to exist in their favor at the time that the Settlement and the releases contained therein become effective. This Section constitutes a waiver, without limitation as to any other applicable law, of Section 1542 of the California Civil Code, which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

**14.03** Plaintiffs and the Settlement Class Members understand and acknowledge the significance of these waivers of California Civil Code Section 1542 and similar federal and state statutes, case law, rules, or regulations relating to limitations on releases. In connection with such waivers and relinquishment, Plaintiffs and the Settlement Class Members acknowledge that they are aware that they may hereafter discover facts in addition to, or different from, those facts that they now know or believe to be true with respect to the subject matter of the Settlement, but that it is their intention to release fully, finally, and forever all Released Claims with respect to the Released Parties, and in furtherance of such intention, the releases of the Released Claims will be and remain in effect notwithstanding the discovery or existence of any such additional or different facts.

**14.04** Covenant Not To Sue. Plaintiffs agree and covenant, and each Settlement Class Member will be deemed to have agreed and covenanted, not to sue any Released Party with respect to any of the Released Claims, or otherwise to assist others in doing so, and agree to be forever barred from doing so, in any court of law or equity, or any other forum.

## XV. TERMINATION OF AGREEMENT

**15.01** Either Plaintiffs or Capital One May Terminate the Agreement. Plaintiffs and Capital One will each have the right to unilaterally terminate this Agreement by providing written notice of his, her, their, or its election to do so ("Termination Notice") to all other Parties hereto within ten (10) business days of any of the following occurrences:

a. the Court rejects, materially modifies, materially amends or changes, or declines to issue a Preliminary Approval Order or a Final Approval Order with respect to the Settlement Agreement;

b. an appellate court reverses the Final Approval Order, and the Settlement Agreement is not reinstated without material change by the Court on remand;

c. any court incorporates into, or deletes or strikes from, or modifies, amends, or changes, the Preliminary Approval Order, the Final Approval Order, or the Settlement Agreement in a way that Plaintiffs or Capital One reasonably consider material, unless such modification or amendment is accepted in writing by all Parties, except that, as provided above, the Court approval of attorneys' fees and costs, or their amount, is not a condition of the Settlement;

d. the Effective Date does not occur; or

e. any other ground for termination provided for elsewhere in this Agreement occurs.

**15.02** Revert to Status Quo If Plaintiffs or Capital One Terminates. If either Plaintiffs or Capital One terminate this Agreement as provided in Section 15.01, the Agreement will be of no force and effect and the Parties' rights and defenses will be restored, without prejudice, to their respective positions as if this Agreement had never been executed, and any orders entered by the Court in connection with this Agreement will be vacated. However, any payments made to the Claims Administrator for services rendered to the date of termination will not be refunded to Capital One.

**15.03** Any Participating Vendor May Terminate Its Participation in the Agreement.

Each Participating Vendor will have the right to unilaterally terminate its participation in this Agreement by providing written notice of his, her, their, or its election to do so ("Termination Notice") to all other Parties hereto within ten (10) business days after any of the following occurrences:

a. the Court rejects, materially modifies, materially amends or changes, or declines to issue a Preliminary Approval Order or a Final Approval Order with respect to the Settlement Agreement;

b. an appellate court reverses the Final Approval Order, and the Settlement Agreement is not reinstated without material change by the Court on remand;

c. any court incorporates into, or deletes or strikes from, or modifies, amends, or changes, the Preliminary Approval Order, the Final Approval Order, or the Settlement Agreement in a way that the Participating Vendor reasonably considers material, unless such modification or amendment is accepted in writing by all Parties, except that, as provided above, the Court approval of attorneys' fees and costs, or their amount, is not a condition of the Settlement;

d. the Effective Date does not occur; or

e. any other ground for termination provided for elsewhere in this Agreement occurs.

**15.04** Revert To Qualified Status Quo if a Participating Vendor Terminates its Participation. If a Participating Vendor terminates its participation in this Agreement as provided herein, the terms of this Agreement that relate to that vendor, and that vendor only, will be of no force and effect. In such an event, the Participating Vendor's and Plaintiffs' rights and defenses will be restored regarding only claims asserted by Plaintiffs, if any, against the terminating Participating Vendor, without prejudice, to the terminating Participating Vendor's and Plaintiffs' respective positions as if this Agreement had never been executed. Any portions of any orders entered by the Court that concern (a) the terminating Participating Vendor's participation, rights, and obligations under this Agreement and (b) the Plaintiffs' participation, rights, and obligations

under this Agreement with regard to the terminating Participating Vendor will be vacated.

**15.05** If a Participating Vendor terminates its participation in this Agreement as provided herein, that Participating Vendor shall be responsible for all reasonable costs of Notice and Claims Administration pursuant to Section 7.03 that are incurred as a result of that Participating Vendor's participation in this Agreement prior to its termination. Any payments made to the Claims Administrator for services rendered to the date of termination will not be refunded to the terminating Participating Vendor.

**15.06** If the Settlement Agreement is not approved in full by the Court, any Party has the option to terminate the Settlement Agreement and revert to the status quo ante prior to the Settlement.

**15.07** If the conditions of the confidential termination provision are met, Capital One has the right in its sole discretion, but not the obligation, to terminate the Settlement Agreement and revert to the status quo ante.

## XVI. NO ADMISSION OF LIABILITY

**16.01** Defendants deny any liability or wrongdoing of any kind associated with the alleged claims in the Master Complaint, as amended. Defendants have denied and continue to deny each and every material factual allegation and all claims asserted against them in the Litigation. Nothing herein will constitute an admission of wrongdoing or liability, or of the truth of any allegations in the Litigation. Nothing herein will constitute an admission by Defendants that the Litigation is properly brought on a class or representative basis, or that classes may be certified, other than for settlement purposes. To this end, the Settlement of the Litigation, the negotiation and execution of this Agreement, and all acts performed or documents executed pursuant to or in furtherance of the Settlement: (i) are not and will not be deemed to be, and may not be used as, an admission or evidence of any wrongdoing or liability on the part of Defendants or of the truth of any of the allegations in the Litigation; (ii) are not and will not be deemed to be, and may not be used as an admission or evidence of any fault or omission on the part of

Defendants in any civil, criminal, or administrative proceeding in any court, arbitration forum, administrative agency, or other tribunal; and, (iii) are not and will not be deemed to be and may not be used as an admission of the appropriateness of these or similar claims for class certification.

**16.02** Pursuant to Federal Rule of Evidence Rule 408 and any similar provisions under the laws of any state, neither this Agreement nor any related documents filed or created in connection with this Agreement will be admissible in evidence in any proceeding, except as necessary to approve, interpret, or enforce this Agreement.

## XVII. MISCELLANEOUS

**17.01** Entire Agreement. This Agreement, the exhibits hereto, and the confidential termination provision referenced in Section 15.07 above constitute the entire agreement between the Parties. No representations, warranties, or inducements have been made to any of the Parties, other than those representations, warranties, and inducements contained in this Agreement.

**17.02** Governing Law. This Agreement will be governed by the laws of the Commonwealth of Virginia.

**17.03** Future Changes in Laws of Regulations. To the extent Congress, the FCC, or any other relevant regulatory authority promulgates different requirements under the TCPA or any other law or regulation that would govern the business practice changes to be implemented by Capital One under this Settlement Agreement, those laws and regulatory provisions will control. However, the Settlement will remain in full force and effect with respect to all other terms and provisions, including the releases provided in Section 14 of this Settlement Agreement.

**17.04** Jurisdiction. The Court will retain continuing and exclusive jurisdiction over the Parties to this Agreement, including the Plaintiffs and all Settlement Class Members, for purposes of the administration and enforcement of this Agreement.

**17.05** No Construction Against Drafter. This Agreement was drafted jointly by the Parties and, in construing and interpreting this Agreement, no provision of this Agreement will

be construed or interpreted against any Party based upon the contention that this Agreement or a portion of it was purportedly drafted or prepared by that Party.

**17.06** Resolution of Disputes. The Parties will cooperate in good faith in the administration of this Settlement and agree to use their best efforts to promptly file a Motion for Preliminary Approval with the Court and to take any other actions required to effectuate this Settlement. Any unresolved dispute regarding the administration of this Agreement will be decided by the Court or by a mediator upon agreement of the Parties.

**17.07** Counterparts. This Agreement may be signed in counterparts and the separate signature pages executed by the Parties and their counsel may be combined to create a document binding on all of the Parties and together will constitute one and the same instrument.

**17.08** Time Periods. The time periods and dates described herein are subject to Court approval and may be modified upon order of the Court or written stipulation of the Parties.

**17.09** Authority. Each person executing this Settlement Agreement on behalf of any of the Parties hereto represents that such person has the authority to so execute this Agreement.

**17.10** No Oral Modifications. This Agreement may not be amended, modified, altered, or otherwise changed in any manner, except by a writing signed by all of the duly authorized agents of Defendants and Plaintiffs, and approved by the Court.

**17.11** Publicity and Confidentiality. Plaintiffs agree that they will not initiate any publicity of the Settlement and will not respond to requests by any media (whether print, online, or any traditional or non-traditional form) about the Settlement or this Agreement. Notice of the Settlement will be delivered exclusively through the notice process set forth in Section 8, above.

**17.12** Notices. Unless otherwise stated herein, any notice to the Parties required or provided for under this Agreement will be in writing and may be sent by electronic mail, fax, or hand delivery, postage prepaid, as follows:

If to Lead Class Counsel:

Beth Terrell, Esq.
Terrell Marshall Daudt & Willie, PLLC

936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
bterrell@tmdwlaw.com

Daniel M. Hutchinson, Esq.
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
dhutchinson@lchb.com

If to counsel for Settling Defendant Capital One:

Aaron D. Van Oort
aaron.vanoort@faegrebd.com
Eileen M. Hunter, *Admitted Pro Hac Vice*
eileen.hunter@faegrebd.com
Erin L. Hoffman, *Admitted Pro Hac Vice*
erin.hoffman@faegrebd.com
FAEGRE BAKER DANIELS
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901
Telephone: (612) 766-7000

If to counsel for Settling Defendant Leading Edge Recovery Solutions, LLC:

Alan I. Greene
Hinshaw & Culbertson LLP
222 N LaSalle Street, Suite 300, Chicago, IL 60601
Tel: 312.704.3536 | Fax: 312.704.3001
E-mail: agreene@hinshawlaw.com

If to counsel for Settling Defendant Capital Management Systems LP:

James K. Schultz
Sessions, Fishman, Nathan & Israel, L.L.C.
55 W. Monroe St., Ste.1120
Chicago, IL 60603
Telephone: 312.578.0990
jschultz@sessions-law.biz

If to counsel for Settling Defendant AllianceOne Receivables Management, Inc.:

Grace A. Carter
Paul Hastings LLP

55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105
Telephone: (415) 856-7000
gracecarter@paulhastings.com

IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement to be executed, dated as of July __, 2014.

DATED: July __, 2014 Plaintiff Bridgett Amadeck

_____

DATED: July __, 2014 Plaintiff David Mack

_____

DATED: July __, 2014 Plaintiff Charles C. Patterson

_____

DATED: July __, 2014 Plaintiff Tiffany Alarcon

_____

DATED: July __, 2014 Plaintiff Andrew Kalik

_____

IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement to be executed, dated as of July __, 2014.

DATED: July __, 2014

Plaintiff Bridgett Amadeck

7-7-2014

Bridgett Amadeck

DATED: July __, 2014

Plaintiff David Mack

_____

DATED: July __, 2014

Plaintiff Charles C. Patterson

_____

DATED: July __, 2014

Plaintiff Tiffany Alarcon

_____

DATED: July __, 2014

Plaintiff Andrew Kalik

_____

DATED: July __, 2014

Capital One Bank (USA), N.A.; Capital One, N.A.; Capital One Financial Corporation; Capital One Services, LLC; and Capital One Services II, LLC

By:_____

55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105
Telephone: (415) 856-7000
gracecarter@paulhastings.com

IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement to be executed, dated as of July __, 2014.

DATED: July __, 2014 Plaintiff Bridgett Amadeck

_____

DATED: July 9, 2014 Plaintiff David Mack

_____

DATED: July __, 2014 Plaintiff Charles C. Patterson

_____

DATED: July __, 2014 Plaintiff Tiffany Alarcon

_____

DATED: July __, 2014 Plaintiff Andrew Kalik

_____

55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105
Telephone: (415) 856-7000
gracecarter@paulhastings.com

IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement to be executed, dated as of July __, 2014.

DATED: July __, 2014 Plaintiff Bridgett Amadeck

_____

DATED: July __, 2014 Plaintiff David Mack

_____

DATED: July 8, 2014 Plaintiff Charles C. Patterson

Charles C. Patterson

DATED: July __, 2014 Plaintiff Tiffany Alarcon

_____

DATED: July __, 2014 Plaintiff Andrew Kalik

_____

55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105
Telephone: (415) 856-7000
gracecarter@paulhastings.com

IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement to be executed, dated as of July __, 2014.

DATED: July __, 2014 Plaintiff Bridgett Amadeck

_____

DATED: July __, 2014 Plaintiff David Mack

_____

DATED: July __, 2014 Plaintiff Charles C. Patterson

_____

DATED: July 9, 2014 Plaintiff Tiffany Alarcon

_____

DATED: July __, 2014 Plaintiff Andrew Kalik

_____

55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105
Telephone: (415) 856-7000
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IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement to be executed, dated as of July __, 2014.

DATED: July __, 2014 Plaintiff Bridgett Amadeck

_____

DATED: July __, 2014 Plaintiff David Mack

_____

DATED: July __, 2014 Plaintiff Charles C. Patterson

_____

DATED: July __, 2014 Plaintiff Tiffany Alarcon

_____

DATED: July 8, 2014 Plaintiff Andrew Kalik

_____

DATED: July 10, 2014

Capital One Bank (USA), N.A.; Capital One, N.A.; Capital One Financial Corporation; Capital One Services, LLC; and Capital One Services II, LLC

By: _____

Name: John G. Finneran, Jr.

Title: General Counsel and Corporate Secretary

DATED: July __, 2014

Capital Management Systems, LP

By: _____

Name: _____

Title: _____

DATED: July __, 2014

Leading Edge Recovery Solutions, LLC

By: _____

Name: _____

Title: _____

DATED: July __, 2014

AllianceOne Receivables Management, Inc.

By: _____

Name: _____

DATED: July __, 2014

Capital One Bank (USA), N.A.; Capital One, N.A.; Capital One Financial Corporation; Capital One Services, LLC; and Capital One Services II, LLC

By:_____

Name: John G. Finneran, Jr.

Title: General Counsel and Corporate Secretary

DATED: July 9, 2014

Capital Management Systems, LP

By:_____

Name: Cory R. Magnuson

Title: General Counsel

DATED: July __, 2014

Leading Edge Recovery Solutions, LLC

By:_____

Name:_____

Title:_____

DATED: July __, 2014

AllianceOne Receivables Management, Inc.

By:_____

Name:_____

DATED: July __, 2014

Capital One Bank (USA), N.A.; Capital One, N.A.; Capital One Financial Corporation; Capital One Services, LLC; and Capital One Services II, LLC

By:_____

Name: John G. Finneran, Jr.

Title: General Counsel and Corporate Secretary

DATED: July __, 2014

Capital Management Systems, LP

By:_____

Name: _____

Title: _____

DATED: July 8th, 2014

Leading Edge Recovery Solutions, LLC

By: _____

Name: James Cross

Title: Manager

DATED: July __, 2014

AllianceOne Receivables Management, Inc.

By:_____

Name: _____

DATED: July __, 2014

Capital One Bank (USA), N.A.; Capital One, N.A.; Capital One Financial Corporation; Capital One Services, LLC; and Capital One Services II, LLC

By:_____

Name: John G. Finneran, Jr.

Title: General Counsel and Corporate Secretary

DATED: July __, 2014

Capital Management Systems, LP

By:_____

Name: _____

Title: _____

DATED: July __, 2014

Leading Edge Recovery Solutions, LLC

By:_____

Name: _____

Title: _____

DATED: July 8, 2014

AllianceOne Receivables Management, Inc.

By: _____

Name: TIM CASEY

Title: CEO

APPROVED AS TO FORM AND CONTENT:

DATED: July __, 2014 FAEGRE BAKER DANIELS

By_____
Aaron D. Van Oort
Eileen M. Hunter
Erin L. Hoffman
Attorneys for Defendant Capital One

DATED: July __, 2014 WILLIAMSON & WILLIAMS

By_____
Kim Williams
Additional Class Counsel,
Attorneys for Plaintiffs
Amadeck and Kalik

DATED: July __, 2014 TERRELL MARSHALL DAUDT & WILLIE PLLC

By_____
Beth Ellen Terrell
Lead Class Counsel,
Attorneys for Plaintiffs
Amadeck and Kalik

Title: _____

APPROVED AS TO FORM AND CONTENT:

DATED: July 10, 2014 FAEGRE BAKER DANIELS

By _____
Aaron D. Van Oort
Eileen M. Hunter
Erin L. Hoffman
Attorneys for Defendant Capital One

DATED: July __, 2014 WILLIAMSON & WILLIAMS

By _____
Kim Williams
Additional Class Counsel,
Attorneys for Plaintiffs
Amadeck and Kalik

DATED: July __, 2014 TERRELL MARSHALL DAUDT & WILLIE PLLC

By _____
Beth Ellen Terrell
Lead Class Counsel,
Attorneys for Plaintiffs
Amadeck and Kalik

Title: _____

APPROVED AS TO FORM AND CONTENT:

DATED: July __, 2014 FAEGRE BAKER DANIELS

By_____
Aaron D. Van Oort
Eileen M. Hunter
Erin L. Hoffman
Attorneys for Defendant Capital One

DATED: July 8, 2014 WILLIAMSON & WILLIAMS

By Kim Williams
Kim Williams
Additional Class Counsel,
Attorneys for Plaintiffs
Amadeck and Kalik

DATED: July __, 2014 TERRELL MARSHALL DAUDT & WILLIE PLLC

By_____
Beth Ellen Terrell
Lead Class Counsel,
Attorneys for Plaintiffs
Amadeck and Kalik

Title: _____

APPROVED AS TO FORM AND CONTENT:

DATED: July __, 2014 FAEGRE BAKER DANIELS

By_____
Aaron D. Van Oort
Eileen M. Hunter
Erin L. Hoffman
Attorneys for Defendant Capital One

DATED: July __, 2014 WILLIAMSON & WILLIAMS

By_____
Kim Williams
Additional Class Counsel,
Attorneys for Plaintiffs
Amadeck and Kalik

DATED: July 8, 2014 TERRELL MARSHALL DAUDT & WILLIE PLLC

By_____
Beth Ellen Terrell
Lead Class Counsel,
Attorneys for Plaintiffs
Amadeck and Kalik

DATED: July 9, 2014

BURKE LAW OFFICES, LLC

By _____
Alexander Holmes Burke
Additional Class Counsel,
Attorneys for Plaintiff Mack

DATED: July __, 2014

LIEFF CABRASER HEIMANN & BERNSTEIN LLP

By _____
Daniel M. Hutchinson
Lead Class Counsel,
Attorneys for Plaintiff Alarcon

DATED: July 8, 2014

KEOGH LAW, LTD

By _____
Keith James Keogh
Liaison Class Counsel,
Attorneys for Plaintiff Patterson

DATED: July __, 2014

MEYER WILSON CO., LPA

By _____
Matthew R. Wilson
Additional Class Counsel,
Attorneys for Plaintiff Alarcon

DATED: July __, 2014

SESSIONS, FISHMAN, NATHAN & ISRAEL LLC

By _____
James K. Shultz
Attorneys for Capital Management Systems,

DATED: July __, 2014 BURKE LAW OFFICES, LLC

By_____
Alexander Holmes Burke
Additional Class Counsel,
Attorneys for Plaintiff Mack

DATED: July 8, 2014 LIEFF CABRASER HEIMANN & BERNSTEIN LLP

By 
Daniel M. Hutchinson
Lead Class Counsel,
Attorneys for Plaintiff Alarcon

DATED: July __, 2014 KEOGH LAW, LTD

By_____
Keith James Keogh
Liaison Class Counsel,
Attorneys for Plaintiff Patterson

DATED: July __, 2014 MEYER WILSON CO., LPA

By_____
Matthew R. Wilson
Additional Class Counsel,
Attorneys for Plaintiff Alarcon

DATED: July __, 2014 SESSIONS, FISHMAN, NATHAN & ISRAEL LLC

By_____
James K. Shultz
Attorneys for Capital Management Systems,

DATED: July __, 2014 BURKE LAW OFFICES, LLC

By_____
Alexander Holmes Burke
Additional Class Counsel,
Attorneys for Plaintiff Mack

DATED: July __, 2014 LIEFF CABRASER HEIMANN & BERNSTEIN LLP

By_____
Daniel M. Hutchinson
Lead Class Counsel,
Attorneys for Plaintiff Alarcon

DATED: July __, 2014 KEOGH LAW, LTD

By_____
Keith James Keogh
Liaison Class Counsel,
Attorneys for Plaintiff Patterson

DATED: July 8, 2014 MEYER WILSON CO., LPA

By_____
Matthew R. Wilson
Additional Class Counsel,
Attorneys for Plaintiff Alarcon

DATED: July __, 2014 SESSIONS, FISHMAN, NATHAN & ISRAEL LLC

By_____
James K. Shultz
Attorneys for Capital Management Systems,

DATED: July __, 2014 BURKE LAW OFFICES, LLC

By_____
Alexander Holmes Burke
Additional Class Counsel,
Attorneys for Plaintiff Mack

DATED: July __, 2014 LIEFF CABRASER HEIMANN & BERNSTEIN LLP

By_____
Daniel M. Hutchinson
Lead Class Counsel,
Attorneys for Plaintiff Alarcon

DATED: July __, 2014 KEOGH LAW, LTD

By_____
Keith James Keogh
Liaison Class Counsel,
Attorneys for Plaintiff Patterson

DATED: July __, 2014 MEYER WILSON CO., LPA

By_____
Matthew R. Wilson
Additional Class Counsel,
Attorneys for Plaintiff Alarcon

DATED: July __, 2014 SESSIONS, FISHMAN, NATHAN & ISRAEL LLC

By_____
James K. Shultz
Attorneys for Capital Management Systems,

LP

DATED: July __, 2014

HINSHAW AND CULBERTSON LLP

By _____
Alan I. Greene
Attorneys for Leading Edge Recovery Solutions, LLC

DATED: July __, 2014

PAUL HASTINGS

By _____
Grace Carter
Attorneys for AllianceOne Receivables Management, Inc.

LP

DATED: July __, 2014 HINSHAW AND CULBERTSON LLP

By_____
Alan I. Greene
Attorneys for Leading Edge Recovery Solutions, LLC

DATED: July 8, 2014 PAUL HASTINGS

By 
Grace Carter
Attorneys for AllianceOne Receivables Management, Inc.

# EXHIBIT A

| TCPA001 | CAPITAL ONE TCPA SETTLEMENT CLAIM FORM |
|---|---|

TO RECEIVE BENEFITS FROM THIS SETTLEMENT, YOU MUST PROVIDE ALL OF THE INFORMATION BELOW AND SIGN THIS CLAIM FORM. YOUR CLAIM FORM MUST BE **POSTMARKED ON OR BEFORE [DATE].** LATE CLAIM FORMS WILL NOT BE CONSIDERED.

## I. CLAIMANT INFORMATION

**Claimant Name**

First Name | Middle Name

Last Name | Suffix

**Mailing Address**

Street/P.O. Box | Unit/Apt. Number

City/Town | State | Zip Code

**Contact Telephone** (Optional)

( ) -

**Email Address** (Optional)

**Notice ID** (Optional)

- -

**Cellular Telephone Number** at which you received one or more non-emergency phone calls from Capital One, between 1/18/2008 and 6/30/2014, or AllianceOne, Capital Management Systems, or Leading Edge Recovery Solutions between 2/28/2009 and 6/30/2014, using an automatic telephone dialing system and/or an artificial or prerecorded voice in an attempt to collect a Capital One credit card debt without your express consent.

( ) -

## II. CERTIFICATION AND SIGNATURE

By submitting this Claim Form, I certify that this information is true and correct.

**Signature** _____ **Date** / / (Month) (Day) (Year)

## III. MAIL THIS CLAIM FORM TO:

Capital One TCPA Settlement Claims Administrator
P.O. Box 25609
Richmond, VA 23260

[(50445-001)]

# EXHIBIT B1

**Email Notice**

**Email Subject: Notice of Class Action Settlement**

**Email Text:**

**Notice of Class Action Settlement**
*A federal court authorized this notice. This is not a solicitation from a lawyer.*

**If you received a non-emergency credit card debt collection call on your cellular telephone from Capital One through the use of an automatic telephone dialing system and/or an artificial or prerecorded voice, you could receive a payment from a class action settlement. You received this email because Capital One's records show you may be a member of the Settlement Class.**

**Si usted recibió una llamada que no fuera de emergencia por su teléfono celular de Capital One mediante el uso de un sistema de marcado automático telefónico y/o voz pregrabada, podría recibir un pago de un arreglo de acción de clase**

*Si desea recibir esta notificación en español, visite nuestra página web o llámenos.*

A $75,455,098.74 Settlement has been reached in a class action lawsuit claiming that Capital One, Leading Edge Recovery Solutions, LLC, Capital Management Systems, LP, and AllianceOne Receivables Management, Inc. unlawfully used an automatic telephone dialing system and/or an artificial or prerecorded voice to call cell phones without the prior express consent of the recipients in an attempt to collect a credit card debt. Capital One, Leading Edge Recovery Solutions, LLC, Capital Management Systems, LP, and Alliance One Receivables Management, Inc. deny that they did anything wrong and the Court has not decided who is right.

**Who's Included?** The Court decided that the Settlement Class includes all persons within the United States who:

(1) received a non-emergency telephone call from Capital One's dialer(s) to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from January 18, 2008, through June 30, 2014,

**or**

(2) received a non-emergency telephone call made on behalf of Capital One by Leading Edge Recovery Solutions, LLC, Capital Management Systems, LP, or AllianceOne Receivable Management, Inc., to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from February 28, 2009, through June 30, 2014.

**What Are the Settlement Terms?** A Settlement Fund of $75,455,098.74 has been established to pay valid claims, attorney fees, service awards, costs, expenses, and settlement administration. Additionally, as a benefit to all Settlement Class Members, Capital One has developed and implemented significant enhancements to its calling systems designed to prevent the calling of borrowers' cellular telephone with an autodialer unless the recipient of the call has provided prior express consent.

**How can You get a Payment?** To get a payment you must submit a claim **using this 15 digit, unique identifier: xxxxxxxxxxxxx**. You can submit your claim online, by calling the toll-free number, or by mail. **It is estimated that payments will be between $20 and $40 per claim.** Each Settlement Class Member is eligible to file only one Claim. The final cash payment amount that Settlement Class Members receive will depend on the total number of valid and timely claims filed. The claim deadline is **[DATE]**.

**Your Other Options.** If you do not want to be legally bound by the Settlement, you must exclude yourself from the Settlement Class by **[DATE]**. If you do not exclude yourself, you will release your claims against Capital One, Capital Management Systems, Leading Edge Recovery Solutions, and AllianceOne Receivables Management, Inc. You may object to the Settlement by **[DATE]**. The detailed notice available on the Claims Administrator's website explains how to exclude yourself or object. The Court will hold a Hearing on **[DATE]** to consider whether to approve the Settlement and a request for attorneys' fees of up to $22,635,992 and service payments of $5,000 each to the five Class Representatives. You may appear at the hearing, either yourself or through an attorney hired by you, but you do not have to appear at the hearing.

For more information, call the Claims Administrator's toll free number (1-844-357-TCPA or 1-844-357-8272)) or visit the Claims Administrator's website at www.CapitalOneTCPASettlement.com.

**Website: www.CapitalOneTCPAsettlement.com**
**Toll-Free Phone Number : 844-357-TCPA or 844-357-8272**
**Address: Capital One TCPA Settlement Claims Administrator, P.O. Box 25609, Richmond, VA 23260**

**Click here if you wish to no longer receive emails from the Capital One TCPA Settlement Claims Administrator.**

# EXHIBIT B2

[OUTSIDE FRONT]



*A federal court authorized this Notice.*
*This is not a solicitation from a lawyer.*

**If you received a non-emergency call on your cellular telephone regarding debt collection for a Capital One credit card through the use of an automatic telephone dialing system and/or a prerecorded voice, you could receive a payment from a class action settlement.**

**Si usted recibió una llamada[IN SPANISH: regarding debt collection for a Capital One credit card] que no fuera de emergencia por su teléfono celular mediante el uso de un sistema de marcado automático telefónico y/o voz pregrabada, podría recibir un pago de un arreglo de acción de clase.**

*Si desea recibir esta notificación en español, visite nuestra página web o llámenos.*

A $75,455,098.74 Settlement has been reached in a class action lawsuit claiming that Capital One, Leading Edge Recovery Solutions, Capital Management Systems, and AllianceOne Receivables Management unlawfully used an automatic telephone dialing system and/or an artificial or prerecorded voice to call cell phones without the prior express consent of the recipients. Each calling entity denies that it did anything wrong, and the Court has not decided who is right.

**www.CapitalOneTCPASettlement.com**
**Toll-Free Number: 1-844-357-TCPA (8272)**

FIRST-CLASS MAIL U.S. POSTAGE PAID PERMIT NO 1234

Capital One TCPA Settlement Claims Administrator
P.O. Box 25609-5609
Richmond, VA 23260
Deadline to file a Claim: 10/30/2014

**You might get a payment from the Class Action Settlement described in this Notice.**

7 012345 678908

**John Q. Sample, Jr.**
123 Main Street
Apt. #4
New York, NY 12345-6789

A115

Legal Notice

member of the Settlement Class. The Court decided that the Settlement Class includes all individuals who:

(1) received one or more non-emergency, debt collection telephone calls from Capital One regarding a Capital One credit card to a cellular telephone through the use of an automatic telephone dialing system and/or an artificial or prerecorded voice between January 18, 2008 and June 30, 2014;
or

(2) received one or more non-emergency, debt collection telephone calls from AllianceOne Receivables Management, Capital Management Systems, or Leading Edge Recovery Solutions regarding a Capital One credit card to a cellular telephone through the use of an automatic telephone dialing system and/or an artificial or prerecorded voice between February 28, 2009, and June 30, 2014.

**What are the Settlement terms?** A Settlement Fund of $75,455,098.74 has been established to pay valid claims, attorneys' fees, service awards, costs, expenses, and settlement administration. Additionally, Capital One has enhanced its business practices to ensure that a borrower has provided consent before being called on a cell phone.

**How can you get a payment?** To get a payment, you can simply tear off, sign, and mail the attached pre-filled, postage pre-paid Claim Form. You can alternatively submit your claim online or by calling the toll-free number. If you submit your

in this Notice labeled "Your Notice ID." It is estimated that payments will be between $20 and $40 per claim. Each Class Member is eligible to file only one Claim. The final cash payment amount that class members receive will depend on the total number of valid and timely claims filed by all Class Members. The claim deadline is **[DATE]**.

**Your other options.** If you do not want to be legally bound by the Settlement, you must exclude yourself by **[DATE]**. If you do not exclude yourself, you will release your claims against Capital One, Leading Edge Recovery Solutions, Capital Management Systems, and AllianceOne Receivables Management. You may object to the Settlement by [**DATE**]. The Detailed Notice available on the website explains how to exclude yourself or object. The Court will hold a Hearing on **[DATE]** to consider whether to approve the Settlement and a request for attorneys' fees of up to $22,635,992 and service payments of $5,000 each to the five Class Representatives. You may appear at the hearing, either yourself or through an attorney hired by you, but you don't have to. For more information, **call 1-844-357-TCPA (8272)**, or visit the website at **www.CapitalOneTCPASettlement.com.**

**Your Notice ID**: 12345-12-12345678

NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

**BUSINESS REPLY MAIL**

FIRST-CLASS MAIL PERMIT NO. 1234 RICHMOND, VA

POSTAGE WILL BE PAID BY THE ADDRESSEE

*Mail To:*
**Capital One TCPA Settlement**
**Claims Administrator**
P.O. Box 25609
Richmond, VA 23260-5609

**Capital One's records show you could receive a payment from a class action settlement. Just tear off, sign, and mail in this Claim Form.**

**The legal notice inside this postcard explains the settlement and your rights.**

| TCPA002 | CAPITAL ONE TCPA SETTLEMENT CLAIM FORM | FILING DEADLINE: 10/30/2014 |
|---|---|---|
| **Claimant Name:** John Q. Sample, Jr.<br>[If you need to edit your name, you must submit your claim online.] | **Claimant Notice ID**: 12345-12-12345678 | 7 012345 678908 |

Sign and date below *if*: (1) you wish to submit a claim for benefits from the Capital One TCPA Settlement Program and (2) you received one or more non-emergency phone calls to your cellular telephone from Capital One, between 1/18/2008 and 6/30/2014, and/or from Capital Management Systems, Leading Edge Recovery Solutions, or AllianceOne Receivables Management on behalf of Capital One, between 2/28/2009 and 6/30/2014, through the use of an automatic telephone dialing system and/or an artificial or prerecorded voice in an attempt to collect a Capital One credit card debt.

You may submit this Claim Form by detaching this postage pre-paid card and placing it in the nearest U.S. Postal Service receptacle. By signing and submitting this Claim Form, you certify that the information provided is true and correct. If you need to edit your name, address, or other information, you must do so online.

| Signature | _____ | Date | ☐☐ / ☐☐ / ☐☐<br>(Month) (Day) (Year) |
|---|---|---|---|

# EXHIBIT B3

**LEGAL NOTICE BY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS**

**IF YOU RECEIVED A NON-EMERGENCY CREDIT CARD DEBT COLLECTION CALL ON YOUR CELLULAR TELEPHONE FROM CAPITAL ONE, LEADING EDGE RECOVERY SOLUTIONS, CAPITAL MANAGEMENT SERVICES, OR ALLIANCEONE RECEIVABLES MANAGEMENT THROUGH THE USE OF AN AUTOMATIC TELEPHONE DIALING SYSTEM AND/OR AN ARTIFICIAL OR PRERECORDED VOICE, YOU COULD RECEIVE A PAYMENT FROM A CLASS ACTION SETTLEMENT.**

*A federal court authorized this notice. This is not a solicitation from a lawyer.*

*Si usted recibió una llamada que no fuera de emergencia por su teléfono celular de Capital One mediante el uso de un sistema de marcado automático telefónico y/o voz pregrabada, podría recibir un pago de un arreglo de acción de clase.*

*Si desea recibir esta notificación en español, visite nuestra página web o llámenos.*

- Plaintiffs brought a lawsuit alleging that Capital One, Capital Management Systems, LP, Leading Edge Recovery Solutions, LLC, and AllianceOne Receivables Management, Inc. Leading Edge Recovery Solutions, Capital Management Services, and AllianceOne Receivables Management violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, et seq. by using an automatic telephone dialing system and/or an artificial or prerecorded voice to place non-emergency servicing calls to cell phones ("Automatic Calls") in connection with servicing credit card accounts that were in default, and that these autodialed calls were made without the prior express consent of Settlement Class Members. Capital One, Capital Management Systems, LP, Leading Edge Recovery Solutions, LLC, and AllianceOne Receivables Management, Inc. deny the allegations in the lawsuit.
- A settlement has been reached in this case and affects individuals who:
  - (1) received a non-emergency telephone call from Capital One's dialer(s) to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from January 18, 2008, through June 30, 2014,
  - **or**
  - (2) received a non-emergency telephone call made on behalf of Capital One by Leading Edge Recovery Solutions, LLC, Capital Management Systems, LP, or AllianceOne Receivables Management, Inc., to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from February 28, 2009, through June 30, 2014.
- The Settlement, if approved, would provide $75,455,098.74 to pay any and all claims from those

who received any of the above-described calls from Capital One or on behalf of Capital One, as well as to pay Plaintiffs' attorneys' fees, costs, service awards for the five Representative Plaintiffs, and the administrative costs of the settlement; it avoids the further cost and risk associated with continuing the lawsuits; pays money to recipients of the calls who make valid and timely claims; and releases Capital One, Capital Management Systems, LP, Leading Edge Recovery Solutions, LLC, and AllianceOne Receivables Management, Inc. from further liability.

- Capital One has developed enhancements to its business practices designed to ensure that customers who receive autodialed calls have provided consent and to protect Settlement Class Members from any future unconsented-to calls.
- **Your legal rights are affected whether you act or don't act. Read this notice carefully.**
- **On the website, www.CapitalOneTCPAsettlement.com, there is a complete notice of the settlement in Spanish.**
- **En el sitio web, www.CapitalOneTCPAsettlement.com, hay una notificación completa del acuerdo en Español.**

| YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT | |
|---|---|
| **OPTION** | **RESULT** |
| **SUBMIT A CLAIM** | This is the only way to get a payment from the Settlement. You can submit a valid and timely claim form online at www.CapitalOneTCPAsettlement.com, by calling the toll-free number, **1-844-357-TCPA (1-888-357-8272),** or by mail to **Capital One TCPA Settlement Claims Administrator, P.O. Box 25609, Richmond, VA 23260-5609**. If you fail to submit a claim, you will not be eligible to receive a settlement payment. The deadline for submitting a claim is **[DATE].** |
| **DO NOTHING** | You will not receive a payment. And you will give up rights to sue Capital One, Capital Management Systems, LP, Leading Edge Recovery Solutions, LLC, and/or AllianceOne Receivables Management, Inc. separately for the legal claims in this case. |
| **EXCLUDE YOURSELF OR "OPT OUT" OF THE SETTLEMENT** | If you ask to be excluded, also known as "opting out," you will get no payment from the Settlement, but you may be able to pursue or continue your own lawsuit against Capital One, Capital Management Systems, LP, Leading Edge Recovery Solutions, LLC, and/or AllianceOne Receivables Management, Inc. about the legal claims in this case. |
| **OBJECT** | Write to the Court about why you believe the Settlement is unfair. |
| **GO TO A HEARING** | Ask to speak in Court about the fairness of the Settlement |

These rights and options - **and the deadlines to exercise them** - are explained in this notice. The Court in charge of this case still has to decide whether to approve the Settlement. Payments will be made if the Court approves the Settlement and after any appeals are resolved. Please be patient.

## BASIC INFORMATION

A Court authorized this Notice because you have a right to know about a proposed Settlement of this class action lawsuit, and about all of your options, before the Court decides whether to approve the Settlement. If the Court approves the Settlement and after any objections or appeals are resolved, an administrator appointed by the Court will make the payments that the Settlement allows. Because your rights will be affected by this Settlement, it is extremely important that you read this Notice carefully.

If you received a postcard or email Notice, it is because, according to Capital One's records, you may have received (1) an Automatic Call from Capital One between January 18, 2008, and June 30, 2014 regarding a Capital One Credit Card Account; or (2) an Automatic Call from Capital Management Systems, LP, Leading Edge Recovery Solutions, LLC, and AllianceOne Receivables Management, Inc. between February 28, 2009, and June 30, 2014 regarding a Capital One Credit Card Account.

The Court in charge of the case is the United District Court for the Northern District of Illinois, and the case is a class action known as In re Capital One Telephone Consumer Protection Act Litigation, Master Docket No. 1:12-cv-10064 (N.D. Ill.). This case was brought by the following individuals, also known as "Representative Plaintiffs": Bridgett Amadeck, Nicholas Martin, Charles C. Patterson, David Mack, and Andrew Kalik. The Representative Plaintiffs sued the following entities, also known as "Defendants": Capital One Bank (USA), N.A., Capital One, N.A., Capital One Financial Corporation, Capital One Services, LLC, Capital One Services II, LLC (collectively "Capital One"), Capital Management Systems, LP, Leading Edge Recovery Solutions, LLC, and AllianceOne Receivables Management, Inc. The proposed Settlement would resolve all claims in the following class action lawsuits: Martin v. Leading Edge Recovery Solutions, LLC, C.A. No. 1:11-05886 (N.D. Ill.), Amadeck v. Capital One Fin. Corp. and Capital One Bank (USA) NA, Case No. 1:12-cv-10135 (N.D. Ill.), and Patterson v. Capital Mgmt. Servs., LP and Capital One Bank (USA) N.A., Case No. 1:12-cv-01061 (N.D. Ill.).

A class action is a lawsuit in which the claims and rights of many people are decided in a single court proceeding. Representative plaintiffs, also known as "class representatives," assert claims on behalf of the entire class.

The Representative Plaintiffs who filed this case against Defendants allege that Capital One violated the TCPA by using an automatic telephone dialing system and/or an artificial prerecorded voice to call cell phones without the prior express consent of the recipients.

Defendants deny that they did anything wrong, or that this case is appropriate for treatment as a class action.

The Court did not decide in favor of the Representative Plaintiffs or Defendants. Both sides agreed to a settlement instead of going to trial. That way, they avoid the cost of a trial, and the people affected will get compensation. The Representative Plaintiffs and their attorneys think the Settlement is best for all Settlement Class Members. The Court in charge of this lawsuit has granted preliminary approval of the Settlement and ordered this Notice be distributed to explain it.

## WHO IS IN THE SETTLEMENT

The Settlement provides relief for all Settlement Class Members, who are described as individuals who:

- (1) received a non-emergency telephone call from Capital One's dialer(s) to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from January 18, 2008, through June 30, 2014,

- **or**

(2) received a non-emergency telephone call made on behalf of Capital One by Leading Edge Recovery Solutions, LLC, Capital Management Systems, LP, or AllianceOne Receivables Management, Inc., to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from February 28, 2009, through June 30, 2014.

Excluded from the Settlement Class are Defendants, their parent companies, affiliates or subsidiaries, or any employees thereof, and any entities in which any of such companies has a controlling interest.

If you have questions about whether you are a Settlement Class Member, or are still not sure whether you are included in the Settlement, you can call the Claims Administrator toll-free at **1-844-357-TCPA (1- 844-357-8272** or visit www.CapitalOneTCPAsettlement.com for more information.

## THE SETTLEMENT BENEFITS - WHAT YOU GET

Defendants have agreed to pay a total settlement amount of $75,455,098.74 which will be used to create a Settlement Fund to pay Settlement Awards to Settlement Class Members, Plaintiffs' attorney fees, service awards to the Representative Plaintiffs, costs, expenses, and settlement administration.

Any residual amount remaining after all the payments included in the Settlement are made that would be economically unfeasible to distribute will be donated to a non-profit(s) to be determined.

Additionally, Capital One will enhance its business practices. As a benefit to all Settlement Class Members, Capital One developed significant enhancements to its servicing systems to ensure that a customer has provided consent before being called on a cell phone.

## HOW YOU GET A PAYMENT

Each Settlement Class Member who submits a valid and timely Claim Form will receive a Settlement Award.

Approved Claims will result in a Cash Award, which is a cash payment. It is estimated that Settlement Class Members' Cash Award will be between $20 and $40 per Settlement Class Member, but the final Cash Award amount will depend on the total number of valid and timely claims filed by all Settlement Class Members. Settlement Class Members are entitled to make only one claim.

Claims may be submitted electronically at www.CapitalOneTCPAsettlement.com, or by calling the toll-free number 1-**844-357-TCPA or 844-357-8272**, or by mail to:

**Capital One TCPA Settlement Claims Administrator**
**P.O. Box 25609**
**Richmond, VA 23260-5609**

The Court will hold a hearing on [DATE] to decide whether to approve the Settlement. If the Settlement is approved, appeals may still follow. It is always uncertain whether these appeals can be resolved, and resolving them can take time, perhaps more than a year. Please be patient.

If you are a Settlement Class Member, unless you exclude yourself, that means that you cannot sue, continue to sue, or be part of any other lawsuit against Defendants about the legal issues in *this* case and all of the decisions and judgments by the Court will bind you.

For non-emergency calls made using an automatic telephone dialing system and/or an artificial or prerecorded voice, without the prior express consent of the called party, the TCPA provides for damages of $500 per call, and up to $1,500 per call if making the call is found to be willful. However, Defendants have denied that they made any illegal calls to anyone, and in any future lawsuit they will have a full range of potential defenses, including that they had prior express consent to make the calls if the consumer provided his or her cellular telephone number to Capital One at any time, and that certain customer agreements provided Defendants with consent to make the calls. In addition, please note that the TCPA does not provide for attorneys' fees to prevailing individual plaintiffs.

If you file a Claim Form for benefits or do nothing at all, you will be unable to file your own lawsuit involving all of the claims described and identified below, and you will release Defendants from any liability for them.

Remaining in the Settlement Class means that you, as well as your respective assigns, heirs, executors, administrators, successors and agents, will release, resolve, relinquish and discharge each and all of Defendants from any and all claims, causes of action, suits, obligations, debts, demands, agreements, promises, liabilities, damages, losses, controversies, costs, expenses, and attorneys' fees of any nature whatsoever, whether based on any federal law, state law, common law, territorial law, foreign law, contract, rule, regulation, any regulatory promulgation (including, but not limited to, any opinion or declaratory ruling), common law or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, punitive or compensatory, as of the date of the Final Approval Order, that arise out of or relate in any way to (1) Capital One's use of an "automatic telephone dialing system" or "an artificial or prerecorded voice" to contact or attempt to contact Settlement Class Members in connection with Capital One's Credit Card Accounts via Calls, as defined in Section 2.05 of the Settlement Agreement, from January 18, 2008, to June 30, 2014, or (2) Capital Management Systems, LP's, Leading Edge Recovery Solutions, LLC's, or AllianceOne Receivables Management,

Inc.'s use of an "automatic telephone dialing system" or "an artificial or prerecorded voice" to contact or attempt to contact Settlement Class Members in connection with Capital One's Credit Card Accounts via Calls, as defined in Section 2.05 of the Settlement Agreement, from February 28, 2009 to June 30, 2014.

Released Claims include the claims of Capital One Credit Card Account holders and non-account holders who are members of the Settlement Class. Released Claims include all TCPA claims and all state law claims arising out of the same Calls to cellular telephones. Remaining in the Settlement Class also means that you further agree that you will not institute any action or cause of action (in law, in equity or administratively), suits, debts, liens, or claims, known or unknown, fixed or contingent, which you may have or claim to have, in state or federal court, in arbitration, or with any state, federal or local government agency or with any administrative or advisory body, arising from or reasonably related to the Released Claims.

The Amended Settlement Agreement (available at the website) provides more detail regarding the release and describes the Released Claims with specific descriptions in necessary, accurate legal terminology, so read it carefully. You can talk to the law firms representing the Settlement Class listed in Question 10 for free or you can, at your own expense, talk to your own lawyer if you have any questions about the Released Parties or the Released Claims or what they mean.

The release does not apply to Settlement Class Members who timely opt-out of the Settlement.

## EXCLUDING YOURSELF FROM THE SETTLEMENT

If you do not want a Cash Award from this Settlement, and you want to keep the right to sue or continue to sue Defendants on your own about the legal issues in this case, then you must take steps to exclude yourself from the Settlement. Sometimes excluding yourself is referred to as "opting out" of the Settlement Class.

To exclude yourself from the Settlement, you must send a letter by mail saying that you want to be excluded from In re Capital One Telephone Consumer Protection Act Litigation, MDL No. 2416, Master Docket No. 1:12-cv-10064 (N.D. Ill.). Be sure to include your full name, address, and telephone number. You must also include a statement that you wish to be excluded from the Settlement. You must mail your letter requesting exclusion postmarked no later than [DATE] to:

**Capital One TCPA Settlement Claims Administrator**
**P.O. Box 25609**
**Richmond, VA 23260-5609**

If you ask to be excluded, you will not get any Settlement Award, and you cannot object to the Settlement. You will not be legally bound by anything that happens in this lawsuit. You may be able to sue (or continue to sue) Defendants in the future about the legal claims in this case.

If you do not exclude yourself and the Settlement is finally approved, you give up any right to sue Capital One, AllianceOne, Capital Management Systems, and Leading Edge Recovery Solutions on any of the claims that this Settlement resolves. If you have a pending lawsuit against Capital One,

Capital Management Systems, LP, Leading Edge Recovery Solutions, LLC, and AllianceOne Receivables Management, Inc. over these claims, speak to your lawyer in that case immediately. You must exclude yourself from this Class to continue your own lawsuit.

You cannot exclude yourself by telephone or by email. You cannot exclude yourself by mailing a request to any location other than the address above or after the deadline. You must sign your letter requesting exclusion. A lawyer cannot sign for you. No one else can sign for you. If you opt out, your name will appear in the Court's records to identify you as someone not bound by the Settlement.

**EXCLUSION LETTERS THAT ARE NOT POSTMARKED ON OR BEFORE [DATE] WILL NOT BE HONORED.**

## THE LAWYERS REPRESENTING YOU

The Court appointed the following law firms to represent you and other Settlement Class Members:

Lead Class Counsel:

Terrell Marshall Daudt & Willie, PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000

*Alarcon* Counsel: Lieff Cabraser Heimann & Bernstein, LLP, and Meyer Wilson Co., LPA;

*Amadeck* Counsel: Terrell Marshall Daudt & Willie PLLC, and Williamson & Williams;

*Kalik* counsel: Terrell Marshall Daudt & Willie PLLC, and Williamson & Williams;

*Mack* Counsel: Burke Law Offices, LLC; and

*Patterson* Counsel: Keogh Law, Ltd.

These lawyers are called Class Counsel. You will not be charged for these lawyers' services. If you want to be represented by your own lawyer, you may hire one at your own expense.

Class Counsel will ask the Court to approve payment of up to $22,636,528 (30% of the Settlement Fund) to compensate them for expenses and for attorneys' fees for investigating the facts, litigating the case, and negotiating the Settlement. Class Counsel will also request an award of service payments of $5,000 each to the five Class Representatives, in compensation for their time and effort. The Court may award less than these amounts. These payments, along with the costs of administering the Settlement, will be made out of the Settlement Fund.

Any objection to Class Counsel's application for attorneys' fees and costs may be mailed, and must

be postmarked no later than [DATE], which is 29 days following the filing of Class Counsel's motion for an award of attorneys' fees and costs. You can object by sending a letter addressed to the Court at the address listed in the next section of this Notice. In your letter you must state that you object. Be sure to include your full name, address, telephone number, and the reasons you object to the proposed award, or to the amount of the proposed award.

## OBJECTING TO THE SETTLEMENT

You can tell the Court that you do not agree with the Settlement or some part of it.

You can tell the Court that you do not agree with the Settlement or some part of it. If you are a Settlement Class Member, you can object to the Settlement if you do not think the Settlement is fair. You can state reasons why you think the Court should not approve it. The Court will consider your views. To object, you must send a letter to the Court saying that you object to the proposed Settlement in In re Capital One Telephone Consumer Protection Act Litigation, MDL No. 2416, Master Docket No. 1:12-cv-10064 (N.D. Ill.). Be sure to include your full name, address, telephone number, the reasons you object to the Settlement and whether you intend to appear at the fairness hearing on your own behalf or through counsel. **Your objection to the Settlement must be postmarked no later than [DATE]**.

The objection must be mailed to:

**Clerk of Court**

**U.S. District Court, Northern District of Illinois**

**Everett McKinley Dirksen United States Courthouse**

**219 South Dearborn Street**

**Chicago, IL 60604**

Objecting is simply telling the Court that you don't like something about the Settlement. You can object only if you stay in the Settlement Class. Excluding yourself (also known as opting out), is telling the Court that you do not want to be included in the Settlement. If you exclude yourself, you cannot object because the Settlement no longer affects you.

## THE FAIRNESS HEARING

The Court will hold a hearing to decide whether to approve the Settlement. This Fairness Hearing will be held at [TIME] on [DATE] in Courtroom 1801 of the U.S. District Court for the Northern District of Illinois, 219 South Dearborn Street, Chicago, Illinois 60604. The hearing may be moved to a different date or time without additional notice, so it is a good idea to check the website for updates. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate, and whether to award attorneys' fees, expenses, and service awards as described above, and in what amounts. If there are objections, the Court will consider them. After the hearing, the Court will decide whether to approve the Settlement. We do not know how long it

will take the Court to issue its decision. It is not necessary for you to appear at this hearing, but you may attend at your own expense.

You may ask the Court for permission to speak at the Fairness Hearing. To do so, you must send a letter saying that you intend to appear at the Fairness Hearing in In re Capital One Telephone Consumer Protection Act Litigation, MDL No. 2416, Master Docket No. 1:12-cv-10064 (N.D. Ill.). Be sure to include your full name, address, and telephone number. You cannot speak at the hearing if you excluded yourself from the Settlement Class. **Your letter stating your notice of intention to appear must be postmarked no later than [DATE] and be sent to the following address:**

**Clerk of Court**

**U.S. District Court, Northern District of Illinois**

**Everett McKinley Dirksen United States Courthouse**

**219 South Dearborn Street**

**Chicago, IL 60604**

## IF YOU DO NOTHING

If you do nothing, and are a Settlement Class Member, you will not receive a Cash Award after the Court approves the Settlement and any appeals are resolved. In order to receive a Cash Award, you must submit a valid and timely Claim Form. Unless you exclude yourself, you will be bound by the terms and conditions of the Settlement and you will not be able to start a lawsuit, continue with a lawsuit, or be part of any other lawsuit against Defendants about the legal issues in this case, ever again.

## GETTING MORE INFORMATION

This Notice summarizes the proposed Settlement. More details are in the Amended Settlement Agreement. You can get a copy of the Amended Settlement Agreement by calling the Claims Administrator toll-free at 1-844-357-TCPA (1-844-357-8272); writing to: Capital One TCPA Settlement Claims Administrator, P.O. Box 25609-5609, Richmond, VA 23260; or visiting the website at www.CapitalOneTCPAsettlement.com, where you will find answers to common questions about the Settlement, a claim form, plus other information to help you determine whether you are a Settlement Class Member and whether you are eligible for a payment or credit.

On the website, www.CapitalOneTCPAsettlement.com, there is a complete notice of the settlement in Spanish.

En el sitio web, www.CapitalOneTCPAsettlement.com, hay una notificación completa del acuerdo en Español.

# EXHIBIT C

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | |
|---|---|
| IN RE CAPITAL ONE TELEPHONE CONSUMER PROTECTION ACT LITIGATION | Master Docket No. 1:12-cv-10064<br>MDL No. 2416 |
| This document relates to:<br><br>BRIDGETT AMADECK, et al.,<br><br>v.<br><br>CAPITAL ONE FINANCIAL CORPORATION, and CAPITAL ONE BANK (USA), N.A. | Case No: 1:12-cv-10135 |
| This document relates to:<br><br>NICHOLAS MARTIN, et al.,<br><br>v.<br><br>LEADING EDGE RECOVERY SOLUTIONS, LLC, and CAPITAL ONE BANK (USA), N.A. | Case No: 1:11-cv-05886 |
| This document relates to:<br><br>CHARLES C. PATTERSON,<br><br>v.<br><br>CAPITAL MANAGEMENT SERVICES, L.P. and CAPITAL ONE BANK (USA), N.A. | Case No: 1:12-cv-01061 |

**[AMENDED PROPOSED] FINAL ORDER OF DISMISSAL**

The Court having held a Final Approval Hearing on [DATE] , notice of the Final Approval Hearing having been duly given in accordance with this Court's Order (1) Conditionally Certifying a Settlement Class, (2) Preliminarily Approving Class Action Settlement, (3) Approving Notice Plan, and (4) Setting Final Approval Hearing ("Preliminary Approval Order"), and having considered all matters submitted to it at the Final Approval Hearing and otherwise, and finding no just reason for delay in entry of this Final Order and good cause appearing therefore,

It is hereby ORDERED AND DECREED as follows:

1. The Amended Settlement Agreement dated July __, 2014, including its exhibits (the "Amended Settlement Agreement"), and the definition of words and terms contained therein are incorporated by reference in this Order. The terms of this Court's Preliminary Approval Order are also incorporated by reference in this Order.

2. This Court has jurisdiction over the subject matter of the Litigation and over the Parties, including all members of the following Settlement Class certified for settlement purposes in this Court's Preliminary Approval Order:

> SETTLEMENT CLASS: All persons within the United States who received a non-emergency telephone call from Capital One's dialer(s) to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from January 18, 2008, through June 30, 2014, and all persons within the United States who received a non-emergency telephone call from a Alliance One, Capital Management Systems, or Leading Edge Recovery Solutions' dialer(s) made on behalf of Capital One to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from February 28, 2009, through June 30, 2014.

3. The definitions and terms set forth in the Amended Settlement Agreement are hereby adopted and incorporated into this Order.[1]

4. The Court hereby finds that the Amended Settlement Agreement is the product of arm's-length settlement negotiations between the Plaintiffs and Class Counsel, and Defendants and their counsel.

5. The Court hereby finds and concludes that Class Notice was disseminated to the Settlement Class Members in accordance with the terms set forth in Section 8 of the Amended Settlement Agreement, and that Class Notice and its dissemination were in compliance with this Court's Preliminary Approval Order.

6. The Court further finds and concludes that the Class Notice and claims submission procedures set forth in Section 8 and 9 of the Amended Settlement Agreement fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all Settlement Class Members who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Class as contemplated in the Amended Settlement Agreement and this Order.

7. This Court hereby finds and concludes that the notice provided by the Class Administrator to the appropriate State and federal officials pursuant to 28 U.S.C. § 1715 fully satisfied the requirements of that statute.

8. A total of [number] Settlement Class Members submitted timely and proper Requests for Exclusion. The Court hereby orders that each of those individuals is excluded from the Settlement Class. Those individuals will not be bound by the Amended Settlement Agreement, and neither will they be entitled to any of its benefits.

[1] The parties shall submit a separate judgment at the final approval hearing.

9. A total of [number] Settlement Class Members submitted timely and proper Objections to the Amended Settlement Agreement. Having considered those Objections and the Parties' responses to them, the Court finds that none of them are well founded. Plaintiffs faced very serious risks both on the merits of their claims and on the ability to certify a litigation class. The value provided pursuant to the Amended Settlement Agreement compares favorably to the strength of Plaintiffs' claims on the merits, given these risks.

10. The Court hereby finally approves the Amended Settlement Agreement, the exhibits, and the Settlement contemplated thereby ("Settlement"), and finds that the terms constitute, in all respects, a fair, reasonable, and adequate settlement as to all Settlement Class Members in accordance with Rule 23 of the Federal Rules of Civil Procedure, and directs its consummation pursuant to its terms and conditions.

11. This Court hereby dismisses, with prejudice, without costs to any party, except as expressly provided for in the Amended Settlement Agreement, the Litigation, as defined in the Amended Settlement Agreement.

12. Upon Final Approval (including, without limitation, the exhaustion of any judicial review, or requests for judicial review, from this Final Order of Dismissal), the Plaintiffs and each and every one of the Settlement Class Members unconditionally, fully, and finally releases and forever discharges the Released Parties from the Released Claims. In addition, any rights of the Settlement Class representatives and each and every one of the Settlement Class Members to the protections afforded under Section 1542 of the California Civil Code and/or any other similar, comparable, or equivalent laws, are terminated.

13. Each and every Settlement Class Member, and any person actually or purportedly acting on behalf of any Settlement Class Member(s), is hereby permanently barred and enjoined

from commencing, instituting, continuing, pursuing, maintaining, prosecuting, or enforcing any Released Claims (including, without limitation, in any individual, class or putative class, representative or other action or proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum, against the Released Parties. This permanent bar and injunction is necessary to protect and effectuate the Amended Settlement Agreement, this Final Order of Dismissal, and this Court's authority to effectuate the Amended Settlement Agreement, and is ordered in aid of this Court's jurisdiction and to protect its judgments.

14. The Amended Settlement Agreement (including, without limitation, its exhibits), and any and all negotiations, documents, and discussions associated with it, shall not be deemed or construed to be an admission or evidence of any violation of any statute, law, rule, regulation or principle of common law or equity, of any liability or wrongdoing, by Defendants, or of the truth of any of the claims asserted by Plaintiffs in the Litigation, and evidence relating to the Amended Settlement Agreement shall not be discoverable or used, directly or indirectly, in any way, whether in the Litigation or in any other action or proceeding, except for purposes of enforcing the terms and conditions of the Amended Settlement Agreement, the Preliminary Approval Order, and/or this Order.

15. If for any reason the Settlement terminates or Final Approval does not occur, then certification of the Settlement Class shall be deemed vacated. In such an event, the certification of the Settlement Class for settlement purposes shall not be considered as a factor in connection with any subsequent class certification issues, and the Parties shall return to the *status quo ante* in the Litigation, without prejudice to the right of any of the Parties to assert any right or position that could have been asserted if the Settlement had never been reached or proposed to the Court.

16. In the event that any provision of the Settlement or this Final Order of Dismissal is asserted by Defendants as a defense in whole or in part to any Claim, or otherwise asserted (including, without limitation, as a basis for a stay) in any other suit, action, or proceeding brought by a Settlement Class Member or any person actually or purportedly acting on behalf of any Settlement Class Member(s), that suit, action or other proceeding shall be immediately stayed and enjoined until this Court or the court or tribunal in which the claim is pending has determined any issues related to such defense or assertion. Solely for purposes of such suit, action, or other proceeding, to the fullest extent they may effectively do so under applicable law, the Parties irrevocably waive and agree not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of the Court, or that the Court is, in any way, an improper venue or an inconvenient forum. These provisions are necessary to protect the Amended Settlement Agreement, this Order and this Court's authority to effectuate the Settlement, and are ordered in aid of this Court's jurisdiction and to protect its judgment.

17. By attaching the Amended Settlement Agreement as an exhibit and incorporating its terms herein, the Court determines that this Final Order complies in all respects with Federal Rule of Civil Procedure 65(d)(1).

18. The Court approves Class Counsel's application for $_____ in attorneys' fees and costs, and for service awards to the five Settlement Class representatives in the amount of $_____ per representative, for a total amount of $_____.

SO ORDERED.

Dated:_____

_____
Hon. James F. Holderman
United States District Court Judge

# EXHIBIT D

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | |
|---|---|
| IN RE CAPITAL ONE TELEPHONE CONSUMER PROTECTION ACT LITIGATION | Master Docket No. 1:12-cv-10064<br>MDL No. 2416 |
| This document relates to:<br><br>BRIDGETT AMADECK, et al.,<br><br>v.<br><br>CAPITAL ONE FINANCIAL CORPORATION, and CAPITAL ONE BANK (USA), N.A. | Case No: 1:12-cv-10135 |
| This document relates to:<br><br>NICHOLAS MARTIN, et al.,<br><br>v.<br><br>LEADING EDGE RECOVERY SOLUTIONS, LLC, and CAPITAL ONE BANK (USA), N.A. | Case No: 1:11-cv-05886 |
| This document relates to:<br><br>CHARLES C. PATTERSON,<br><br>v.<br><br>CAPITAL MANAGEMENT SERVICES, L.P. and CAPITAL ONE BANK (USA), N.A. | Case No: 1:12-cv-01061 |

**[PROPOSED] ORDER (1) CONDITIONALLY CERTIFYING A SETTLEMENT CLASS, (2) PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT, (3) APPROVING NOTICE PLAN, AND (4) SETTING FINAL APPROVAL HEARING**

This matter came before the Court on Class Plaintiffs' motion for preliminary approval of the proposed class action settlement of the following three class action cases that were transferred to this Court under a Multidistrict Litigation Transfer Order: *Martin v. Leading Edge Recovery Solutions, LLC*, C.A. 1:11-cv-05886 (N.D. Ill.) (the "*Mack* Action"), *Amadeck et al. v. Capital One Financial Corp. and Capital One Bank (USA) NA*, C.A. 1:12-cv-10135 (N.D. Ill.) (the "*Amadeck* Action"), and *Patterson v. Capital Management Services, LP and Capital One Bank (USA) N.A.*, C.A. 1:12-cv-01061 (N.D. Ill.) (the "*Patterson* Action"). These three cases were consolidated into a single Master Class Action Complaint filed in this Court on February 28, 2013, Dkt. 19, which was amended on June 13, 2014, Dkt.120 (collectively, the "Litigation"). The Litigation was brought by Class Plaintiffs Bridgett Amadeck, Tiffany Alarcon, Charles C. Patterson, David Mack, and Andrew Kalik ("Class Plaintiffs" or "Class Representatives"), individually and on behalf of all others similarly situated against Defendants Capital One Bank (USA), N.A., Capital One, N.A., Capital One Financial Corporation, Capital One Services, LLC, and Capital One Services II, LLC (together, "Capital One"); Capital Management Systems, LP ("CMS"); Leading Edge Recovery Solutions, LLC ("Leading Edge"); and AllianceOne Receivables Management, Inc. ("AllianceOne"). CMS, Leading Edge, and AllianceOne are collectively the "Participating Vendors." Together with Capital One, they are the "Defendants." Based on this Court's review of the Parties' Amended Settlement Agreement and Release (the "Agreement" or "Amended Settlement Agreement"), Class Plaintiffs' Motion for Preliminary Approval of Settlement, and the arguments of counsel, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

1. Settlement Terms. Unless otherwise defined herein, all terms in this Order shall have the meanings ascribed to them in the Agreement.

2. Jurisdiction. The Court has jurisdiction over the subject matter of the Litigation, the Parties, and all Settlement Class Members.

3. Scope of Settlement. The Agreement resolves all claims alleged in the Consolidated Master Class Action Complaint filed in the Northern District of Illinois on February 28, 2013, as amended on June 13, 2014. *See In re Capital One Telephone Consumer Protection Act Litigation*, MDL No. 2416, Master Docket No. 1:12-cv-10064, Dkts. 19, 120. The Consolidated Master Class Action Complaint superseded the complaints filed in the *Mack*, *Amadeck*, and *Patterson* Actions and, as amended, is the controlling Complaint.

4. Preliminary Approval of Proposed Amended Settlement Agreement. The Court has conducted a preliminary evaluation of the Settlement as set forth in the Agreement for fairness, adequacy, and reasonableness. Based on this preliminary evaluation, the Court finds that: (i) the Agreement is fair, reasonable, and adequate, and within the range of possible approval; (ii) the Agreement has been negotiated in good faith at arm's length between experienced attorneys familiar with the legal and factual issues of this case; and (iii) with respect to the forms of notice of the material terms of the Agreement to Settlement Class Members for their consideration and reaction (Exs. B1, B2, and B3 to the Agreement), that notice is appropriate and warranted. Therefore, the Court grants preliminary approval of the Settlement.

5. Class Certification for Settlement Purposes Only. The Court, pursuant to Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure, conditionally certifies, for purposes of this Settlement only, the following Settlement Class:

> All persons within the United States who received a non-emergency telephone call from Capital One's dialer(s) to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from January 18, 2008, through

> June 30, 2014, and all persons within the United States who received a non-emergency telephone call from a Participating Vendor's dialer(s) made on behalf of Capital One to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice in connection with an attempt to collect on a credit card debt from February 28, 2009, through June 30, 2014. Excluded from the Settlement Class are Defendants and any affiliate or subsidiary of Defendants, and any entities in which any of such companies have a controlling interest, as well as all persons who validly opt out of the Settlement Class.

6. In connection with this conditional certification, the Court makes the following preliminary findings:

(a) The Settlement Class appears to be so numerous that joinder of all members is impracticable;

(b) There appear to be questions of law or fact common to the Settlement Class for purposes of determining whether the Settlement should be approved;

(c) Class Plaintiffs' claims appear to be typical of the claims being resolved through the Settlement;

(d) Class Plaintiffs appear to be capable of fairly and adequately protecting the interests of all members of the Settlement Class in connection with the Settlement;

(e) For purposes of determining whether the Amended Settlement Agreement is fair, reasonable, and adequate, common questions of law and fact appear to predominate over questions affecting only individual persons in the Settlement Class. Accordingly, the Settlement Class appears to be sufficiently cohesive to warrant settlement by representation; and

(f) For purposes of settlement, certification of the Settlement Class appears to be superior to other available methods for the fair and efficient settlement of the claims of the Settlement Class.

7. Class Representatives. The Court appoints Class Plaintiffs as Class Representatives of the Settlement Class pursuant to Rule 23 of the Federal Rules of Civil Procedure.

8. Class Counsel. The Court appoints Lieff, Cabraser, Heimann & Bernstein, LLP, and Terrell Marshall Daudt & Willie PLLC, as Lead Class Counsel; Keogh Law, Ltd., as Liaison Counsel; and Williamson & Williams, Meyer Wilson Co., LPA, and Burke Law Offices, LLC, as Additional Class Counsel (collectively "Class Counsel") pursuant to Rule 23 of the Federal Rules of Civil Procedure.

9. Final Approval Hearing. At 9:00 a.m. on December 2, 2014, in courtroom 1801 of the Everett McKinley Dirksen Building, United States Courthouse, 219 Dearborn Street, Chicago, Illinois, or at such other date and time later set by Court Order, this Court will hold a Final Approval Hearing on the fairness, adequacy, and reasonableness of the Agreement and to determine whether (i) final approval of the Settlement embodied by the Agreement should be granted, and (ii) Class Counsel's application for attorneys' fees and expenses, and incentive awards to Class Plaintiffs should be granted, and in what amount. No later than September 29, 2014, Class Plaintiffs must file papers in support of Class Counsel's application for attorneys' fees and expenses and the incentive awards to the Class Representatives. No later than November 18, 2014, which is fourteen (14) days prior to the Final Approval Hearing, Class Plaintiffs must file papers in support of final approval of the Settlement and respond to any written objections. Defendants may (but are not required to) file papers in support of final approval of the Settlement, so long as they do so no later than November 18, 2014.

10. Settlement Claims Administrator. Pursuant to the Agreement, BrownGreer PLC ("BrownGreer") is hereby appointed as Claims Administrator and shall be required to perform all the duties of the Claims Administrator as set forth in the Agreement and this Order.

11. Class Notice. The Court approves the proposed Notice Plan for giving notice to the Settlement Class directly (using e-mail and post cards), through publication via an online media campaign, and through the establishment of a Settlement Website (www.CapitalOneTCPASettlement.com), as more fully described in the Agreement. The Notice Plan, in form, method, and content, complies with the requirements of Rule 23 and due process, and constitutes the best notice practicable under the circumstances. The Court hereby directs the Parties and the Claims Administrator to complete all aspects of the Notice Plan no later than August 28, 2014, in accordance with the terms of the Agreement.

12. The Claims Administrator will file with the Court by no later than November 18, 2014, which is fourteen (14) days prior to the Final Approval Hearing, proof that Notice was provided in accordance with the Agreement and this Order, as well as proof that notice was provided to the appropriate State and federal officials pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715.

13. Objection and Op-Out Deadline. Settlement Class Members who wish to either object to the Settlement or opt out by completing a Request for Exclusion must do so by the Objection Deadline and Opt-Out Deadline of October 27, 2014, both of which are sixty (60) calendar days after the Settlement Notice Date. Settlement Class Members may not both object and opt out. If a Settlement Class Member submits both a Request for Exclusion and an objection, the Request for Exclusion will be controlling.

14. Exclusion from the Settlement Class. To file a Request for Exclusion, Settlement Class Members must follow the directions in the Notice and send a compliant request to the Claims Administrator at the address designated in the Class Notice by the Opt-Out Deadline. In the Request for Exclusion, the Settlement Class Member must state his or her full name, address, and cellular telephone number(s) at which the Settlement Class Member alleges he or she received a call from one of the Defendants, and must state that he or she wishes to be excluded from the Settlement. No Request for Exclusion will be valid unless all of the information described above is included. No Settlement Class Member, or any person acting on behalf of or in concert or participation with that Settlement Class Member, may exclude any other Settlement Class Member from the Settlement Class.

15. If a timely and valid Request for Exclusion is made by a Settlement Class Member, then that person will not be a Settlement Class Member, and the Agreement and any determinations and judgments concerning it will not bind the excluded person.

16. All Settlement Class Members who do not opt out by filing a Request for Exclusion by October 27, 2014 in accordance with the terms set forth in the Agreement will be bound by all determinations and judgments concerning the Agreement.

17. Objections to the Settlement. To object to the Settlement, Settlement Class Members must follow the directions in the Notice and file a written Objection with the Court by the Objection Deadline. In the written Objection, the Settlement Class Member must state his or her full name, address, and cellular telephone number(s) that the Settlement Class Member alleges received a call from one of the Defendants, and must state the reasons for his or her Objection, and whether he or she intends to appear at the Fairness Hearing on his or her own behalf or through counsel. Any documents supporting the Objection must also be

attached to the Objection. No Objection will be valid unless all of the information described above is included. Copies of all papers filed with the Court must be delivered by the objector to Class Counsel and counsel for each of the Defendants on the same day. The Parties will have the right to depose any objector to assess whether the objector has standing.

18. If a Settlement Class Member does not submit a written Objection to the proposed Settlement or the application of Class Counsel for attorneys' fees and expenses or the incentive awards in accordance with the deadline and procedure set forth in the Notice and this Order, but the Settlement Class Member wishes to appear and be heard at the Final Approval Hearing, the Settlement Class Member must (i) file a notice of intention to appear with the Court; (ii) serve a copy upon Class Counsel and Counsel for each of the Defendants no later than the Objection Deadline; and (iii) comply with all other requirements of the Court for such an appearance.

19. Any Settlement Class Member who fails to comply with Paragraphs 17 and 18 (and as detailed in the Notice) will not be permitted to object to the Agreement at the Final Approval Hearing, will be foreclosed from seeking any review of the Agreement by appeal or other means, will be deemed to have waived his, her, or its objections, and will be forever barred from making any objections in the Action or any other related action or proceeding. All members of the Settlement Class, except those members of the Settlement Class who submit timely Requests for Exclusion, will be bound by all determinations and judgments in the Litigation, whether favorable or unfavorable to the Settlement Class.

20. Stay of Other Proceedings. Pending the final determination of whether the Settlement should be approved, all pre-trial proceedings and briefing schedules in the

Litigation are stayed. If the Settlement is terminated or final approval does not for any reason occur, the stay will be immediately terminated.

21. Pending the final determination of whether the Settlement should be approved, the Settlement Class Representatives and all Settlement Class Members are hereby stayed and enjoined from commencing, pursuing, maintaining, enforcing, or prosecuting, either directly or indirectly, any Released Claims in any judicial, administrative, arbitral, or other forum, against any of the Released Parties. Such injunction will remain in force until Final Approval or until such time as the Parties notify the Court that the Settlement has been terminated. Nothing herein will prevent any Settlement Class Member, or any person actually or purportedly acting on behalf of any Settlement Class Member(s), from taking any actions to stay or dismiss any Released Claim(s). This injunction is necessary to protect and effectuate the Agreement, this Preliminary Approval Order, and the Court's flexibility and authority to effectuate the Agreement and to enter Judgment when appropriate, and is ordered in aid of this Court's jurisdiction and to protect its judgments. This injunction does not apply to any person who files a Request for Exclusion pursuant to Paragraphs 13 and 14 of the Order

22. The provisions of Paragraph 21 do not apply to the non-class cases consolidated within *In re Capital One Telephone Consumer Protection Act Litigation*, MDL No. 2416, Master Docket No. 1:12-cv-10064, (the "Individual Case(s)"). A pretrial discovery schedule will be set separately for the Individual Cases. The parties to the Individual Cases are hereby enjoined from filing any dispositive motions. Such injunction will remain in force until Final Approval or until such time as the Parties notify the Court that the Settlement has been terminated. Nothing herein will prevent the parties to any Individual Case from settling or dismissing an Individual Case.

23. If the Settlement is not approved or consummated for any reason whatsoever, the Settlement and all proceedings in connection with the Settlement will be without prejudice to the right of Defendants or the Class Representatives to assert any right or position that could have been asserted if the Agreement had never been reached or proposed to the Court, except insofar as the Agreement expressly provides to the contrary. In such an event, the Parties will return to the *status quo ante* in the Litigation and the certification of the Settlement Class will be deemed vacated. The certification of the Settlement Class for settlement purposes will not be considered as a factor in connection with any subsequent class certification issues.

24. No Admission of Liability. The Agreement and any and all negotiations, documents, and discussions associated with it, will not be deemed or construed to be an admission or evidence of any violation of any statute, law, rule, regulation, or principle of common law or equity, or of any liability or wrongdoing by Defendants, or the truth of any of the claims. Evidence relating to the Agreement will not be discoverable or used, directly or indirectly, in any way, whether in the Litigation or in any other action or proceeding, except for purposes of demonstrating, describing, implementing, or enforcing the terms and conditions of the Agreement, this Order, and the Final Order of Dismissal.

25. Reasonable Procedures to Effectuate the Settlement. Counsel are hereby authorized to use all reasonable procedures in connection with approval and administration of the Settlement that are not materially inconsistent with this Order or the Agreement, including making, without further approval of the Court, minor changes to the form or content of the Notice and Claim Form and other exhibits that they jointly agree are reasonable and necessary. The Court reserves the right to approve the Agreement with such modifications, if any, as may be agreed to by the Parties without further notice to the members of the Class.

26. Schedule of Future Events. Accordingly, the following are the deadlines by which certain events must occur:

| | |
|---|---|
| **August 28, 2014** [30 calendar days after the date of this order] | Deadline to Provide Class Notice |
| **September 29, 2014** [30 days after the Settlement Notice Date, adjusted for the weekend] | Deadline for Class Plaintiffs' Motion for Attorneys' Fees and Incentive Awards |
| **October 27, 2014** [60 days after the Settlement Notice Date] | Deadline for Class Members to file Objections or submit Requests for Exclusion |
| **November 18, 2014** [14 days before the Final Approval Hearing] | Deadline for Parties to File the Following:<br>(1) List of Class Members who Made Timely and Proper Requests for Exclusion;<br>(2) Proof of Class Notice and CAFA Notice; and<br>(3) Motion and Memorandum in Support of Final Approval, including responses to any Objections. |
| **November 26, 2014** [90 days after the Settlement Notice Date] | Deadline for Settlement Class Members to Submit a Claim Form |
| **December 2, 2014, at 9:00am** | Final Approval Hearing |

Case: 15-1546 Document: 30 Filed: 05/04/2015 Pages: 229

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE**
**NORTHERN DISTRICT OF ILLINOIS**

NICHOLAS MARTIN, et al.,

Plaintiff(s),

v.

LEADING EDGE RECOVERY SOLUTIONS, LLC, and CAPITAL ONE BANK (USA), N.A..,

Defendant(s).

Case No. 11 C 5886
Judge James F. Holderman

**JUDGMENT IN A CIVIL CASE**

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $ ,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

---

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

---

☒ other: as stated in the court's Final Order of Dismissal and Final Judgment (MDL Dkt. No 336).

---

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge James F. Holderman on a motion for final approval of the class action settlement.

Date: 2/23/2015

Thomas G. Bruton, Clerk of Court

Maria G. Hernandez, Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE**
**NORTHERN DISTRICT OF ILLINOIS**

BRIDGETT AMADECK, et al.,

Plaintiff(s),

v.

CAPITAL ONE FINANCIAL CORPORATION, and CAPITAL ONE BANK (USA), N.A.,

Defendant(s).

Case No. 12 C 10135
Judge James F. Holderman

## JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $ ,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

---

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

---

☒ other: as stated in the court's Final Order of Dismissal and Final Judgment (MDL Dkt. No 336).

---

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge James F. Holderman on a motion for final approval of the class action settlement.

Date: 2/23/2015

Thomas G. Bruton, Clerk of Court

Maria G. Hernandez, Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE**
**NORTHERN DISTRICT OF ILLINOIS**

CHARLES C. PATTERSON,

Plaintiff(s),

v.

CAPITAL MANAGEMENT SERVICES, L.P. and CAPITAL ONE BANK (USA), N.A.,

Defendant(s).

Case No. 12 C 1061
Judge James F. Holderman

**JUDGMENT IN A CIVIL CASE**

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $ ,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

---

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

---

☒ other: as stated in the court's Final Order of Dismissal and Final Judgment (MDL Dkt. No 336).

---

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge James F. Holderman on a motion for final approval of the class action settlement.

Date: 2/23/2015

Thomas G. Bruton, Clerk of Court

Maria G. Hernandez, Deputy Clerk